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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF WISCONSIN,
WITH
TABLES OF THE CASES AND PRINCIPAL MATTERS.

O. M. CONOVER,
OFFICIAL REPORTER.

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JUDGES OF THE SUPREME COURT

OF THE

STATE OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

ORSAMUS COLE,	CHIEF JUSTICE.
WILLIAM P. LYON,	} ASSOCIATE JUSTICES.
DAVID TAYLOR,	
HARLOW S. ORTON,	
JOHN B. CASSODAY,	

<i>Attorney General,</i>	-	-	L. F. FRISBY.
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<i>Clerk,</i>	-	-	-	CLARENCE KELLOGG.
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TABLE

OF THE

NAMES OF CASES

REPORTED IN THIS VOLUME.

<i>Allen, Defendant, and Campbell, Garnishee, Hewett v.</i>	583
<i>Ashland Lumber Company, Cockburn and another v..</i>	619
<i>Ault v. The Wheeler & Wilson Manufacturing Com- pany</i>	300

VERDICT. (1) What questions to be submitted for special verdict.

(2) Special and general verdicts.

CONVERSION: DEMAND. (3, 4) When proof of demand necessary
in action for conversion.

AMENDMENT: (5) Of complaint after verdict.

<i>Baker v. The State</i>	368
---------------------------------	-----

STATUTE CONSTRUED: CONSTITUTIONAL LAW. Criminal liability of
banker taking deposits, etc., with knowledge of his insolvency.

<i>Baker, Garnishee, and others, Warder and others v....</i>	49
<i>Ballou, Administratrix, v. The Chicago, Milwaukee & St. Paul Railway Company</i>	257

RAILROADS. Negligence of one company in respect to construction
of freight cars of other companies used on its road.

<i>Barnes, imp., Tallman v.</i>	181
<i>Barteau, Trerice and another v.</i>	99

<i>Beaudin and another, Boyd v.</i>	193
<i>Benson and others, Boland, Clerk, etc., v.</i>	387
<i>Bierbach v. The Goodyear Rubber Company.</i>	208

DAMAGES FOR PERSONAL INJURIES. EVIDENCE. (1) Injury to business; what proof admissible. (2) Pleading and proof. (3) Weight of evidence as affected by number of witnesses.

<i>Black River Flooding-Dam Association v. Ketchum and others.</i>	313
--	-----

PRIVATE CORPORATIONS: IMPROVEMENT OF NAVIGABLE RIVERS. (1) Right to improve navigable stream, statutory. (2, 3) Plaintiff's rights in respect to improvement of Black river: Alleged conflict between special charter and general law.

<i>Black River Improvement Company v. The La Crosse Booming & Transportation Company and others.</i> ..	659
---	-----

CORPORATIONS: NAVIGABLE RIVERS: RIPARIAN OWNERS. (1) Plaintiff's powers under its charter. (2) Its right to take lands of state without compensation. (3, 4) Subsequent purchasers from state bound. (5) Rights of riparian proprietors as against the state or its agents.

<i>Bliss, Kelly v.</i>	187
<i>Boardman and another v. The Westchester Fire Insurance Company of New York.</i>	364

DISCRETIONARY ORDERS. (1) View of premises.

REVERSAL OF JUDGMENT. (2) Errors must appear from record. (3) Arguments of counsel not grounds of error.

<i>Boland, Clerk, etc., v. Benson and others.</i>	387
---	-----

SUPREME COURT. Limit of power to modify its own judgment.

<i>Borchardt v. The Wausau Boom Company.</i>	107
--	-----

FLOWAGE OF LAND. (1) When not a cause of action. (2) What questions for the jury.

REVERSAL OF JUDGMENT: (3) For refusal to instruct.

<i>Bowles, imp., The Fond du Lac Harrow Company v.</i> ...	425
--	-----

Boyd v. Beaudin and another..... 193

PRACTICE: COUNTERCLAIM: JUDGMENT. (1) Rights of each of several defendants to several counterclaim and judgment.

EQUITY: REDEMPTION. (2) When action to redeem proper remedy. (3, 4) How far a tender necessary before action to redeem. (5) Counterclaim for redemption, etc. (6) Parties defendant in action to redeem. (7, 8) Rights of mortgagee as to purchasing at mortgage sale.

PLEADING. (9) Misjoinder of plaintiffs no ground of demurrer.

Breed, Ketchum v...... 131*Brown and wife v. The Chicago, Milwaukee & St. Paul Railway Company*..... 342

TORTS: PLEADING: DAMAGES. (1) Complaint held to go for a tort, and not for a breach of contract. (2, 3) Rule of damages: Unforeseen consequences. (4) Direct or proximate consequences.

REVERSAL OF JUDGMENT: (5) On weight of evidence.

Bullard v. Kuhl..... 544

APPEAL FROM JUSTICE'S COURT. Case cannot be tried *de novo* by stipulation.

Butterfield, Tetz v...... 242*Campbell v. Campbell*..... 90

SLANDER. (1) In what sense words to be taken. (2) Case stated; nonsuit improperly granted. (3) Proof of the person to whom the words referred. (4) Plaintiff's character as affecting damages.

Campbell, Garnishee, and Allen, Defendant, Hewett v. 583*Case Threshing Machine Company v. Miracle, Executor, Garnishee*..... 295

Liability of administrator to garnishment.

Chicago, Milwaukee & St. Paul Railway Company, Ballou, Administratrix, v...... 257*Chicago, Milwaukee & St. Paul Railway Company, Brown and wife v.*..... 342*Chicago, St. Paul & Minneapolis Railway Company, Jewell v.*..... 610

<i>Chicago & Northwestern Railway Company, Goddard v.</i>	548
<i>City of Sheboygan, Sheboygan County v.</i>	415
<i>Clarke v. Lincoln County.</i>	578

Limitation of actions: Pleading. (1) Action to cancel tax certificate: how limited. (2) Reference to statute in demurrer. (3) Presumption from complaint as to time of commencing action.

<i>Clarke v. Lincoln County.</i>	580
----------------------------------	-----

LIMITATION OF ACTION to cancel Tax Certificate. (1) Act of 1878 valid. (2) When stay of proceedings, for re-assessment, imperative.

<i>Clayton, Town of, The Town of Scott v.</i>	499
<i>Cockburn and another v. The Ashland Lumber Company</i>	619

Executory contract for sale of goods: Measure of damages for a breach on vendor's part: Evidence.

<i>Cole and another, Tucker v.</i>	539
<i>Conklin, Strasser v.</i>	102
<i>Corning, Garnishee, and others, Kirby and others v.</i>	599
<i>County of Lincoln, Clarke v.</i>	578
<i>County of Lincoln, Clarke v.</i>	580
<i>County of Manitowoc, Waldo v.</i>	71
<i>County of Sheboygan v. The City of Sheboygan.</i>	415
<i>County of Winnebago, Hull v.</i>	291
<i>Cramer and others, Eviston v.</i>	220
<i>Cutler, James v.</i>	172
<i>Cutler and another, Putney v.</i>	66

<i>Davis and another, imp., Jenkins and others v.</i>	253
<i>Dean and another, Executors, v. Dean and others.</i>	23

WILLS. (1) Will construed: "Capital" as distinguished from accrued and undivided profits. (2) Costs in actions for construction of wills.

<i>Dellinger, Lyle v.</i>	404
<i>Dellinger, Powers v.</i>	389
<i>Devendorf, imp., Lord v.</i>	491
<i>Devendorf, imp., Messersmith v.</i>	498

Durkee v. Felton, imp...... 405

EJECTMENT. (1) Proof of ouster by tenant in common. (2) Amendment of pleading at trial. Withdrawal of admission. (3) Record evidence construed.

Elliott and another v. Espenhain and another..... 231

PLEADING. Answer construed: Does it deny or admit alleged partnership? Conditional counterclaim.

Espenhain and another, Elliott and another v...... 231*Evans v. The St. Paul Fire & Marine Insurance Co.* 522

PRACTICE. Limit of power to enlarge time for settling bill of exceptions.

Eviston v. Cramer and others..... 220

LABEL: PLEADING: VERDICT: COSTS ON APPEAL. (1) Pleading in mitigation of damages, after justification. (2) Special verdict as to malice, construed. (3) Costs on reversal, notwithstanding respondent's offer of new trial, etc.

Felton, imp., Durkee v...... 405*First National Bank of Baraboo and others, Mowry, Assignee, v.*..... 38*Fond du Lac Harrow Company v. Bowles, imp.*..... 425

Liability of guarantor.

Foster v. Taggart..... 391

CAUSE OF ACTION. Damages for false representations in sale of securities.

Frey and others, Hayes v...... 503*Galloway v. Week and another*..... 604

SALE OF CHATTELS. (1, 2) Contract for sale of lumber construed. When title passed.

REVERSAL OF JUDGMENT: (3) For immaterial error.

Geir and another, Lockhart v...... 133*Goddard v. Chicago & Northwestern Railway Company,* 548

COURT AND JURY. Question of negligence improperly submitted.

<i>Goodyear Rubber Company, Bierbach v.</i>	208
<i>Gunsolus and others v. Lormer and others</i>	630

TRESPASS QUARE CLAUSUM: (1-3) Who may bring the action.

MUNICIPAL COURT OF DANE COUNTY. (4) When judge acts as J.

P. Form of appeal to circuit court in such cases. (5) Form of judgment of circuit court in such cases.

<i>Haase, Ladwig and another v.</i>	311
<i>Hammel v. The Queen's Insurance Company of London and Liverpool</i>	72

INSURANCE AGAINST FIRE: *Forfeiture clauses construed*. (1) "Levy of an execution" inapplicable to realty. (2) "Alienation" or "change in title or possession," inapplicable to execution sale of realty.

<i>Hardy and another v. Scales and others</i>	452
---	-----

ESTATES OF DECEDENTS. Rights of testator's widow as to property not disposed of by the will.

<i>Hayes v. Frey and others</i>	503
---------------------------------------	-----

PRACTICE. (1) Separate trials for several defendants: pendency of appeal by one defendant. (2) Discretion of court as to continuance.

DEED: MARRIED WOMAN. (3) Taking wife's acknowledgment.

FORECLOSURE SALE *without action*: (4) Must comply with statute. (5) Presumption in favor of sale. (6) Sale by foreign executor: what preliminary steps required. (7) Who takes the mortgage "by assignment." (8) Sec. 3267, R. S., considered. (9) Sale under power: statute of limitation. (10) Certificate of sale: misrecital as to time when deed issues; absence of a seal. (11) What officer executes deed.

DEPOSITION: (12) When taken before notary, how authenticated.

<i>Hewett v. Allen, Defendant, and Campbell, Garnishee</i> . 583	
--	--

HOMESTEAD: To whom exemption of proceeds applies.

<i>Houghton v. Milburn and wife</i>	554
---	-----

PRACTICE. (1) Motion virtually disposed of.

CONTRACTS. (2:1) Covenant to maintain third person, construed.

(2:2) Moneys paid in consideration thereof, not a trust fund. (2:3) Who may sue on such covenant.

MARRIED WOMAN. (3) Joint covenant with her husband: separate estate.

<i>Howland v. The Milwaukee, Lake Shore & Western Railway Company</i>	226
RAILROADS: NEGLIGENCE. Known perils of employment: Negligence of fellow-servant.	
<i>Hull v. Winnebago County</i>	291
COUNTY BOARD: When it may determine salary of county treasurer.	
<i>In re Orton</i>	379
DISEMBARRING ATTORNEY. (1) Appealable order. (2) How attorney to be notified of charges. (3) Court may act on its own motion.	
<i>Inter-Ocean Transportation Company v. Sheriffs and others</i>	202
Contract for construction of machinery, etc., construed: Duty of reasonable diligence.	
<i>James v. Cutler</i>	172
REFORMATION OF DEED. (1) What facts authorize reformation as for mistake. (2) Complaint construed. (3) Proof of mistake on plaintiff's part and fraud or mistake on defendant's part.	
APPEAL TO S. C. (4) When findings of fact by court below reversed.	
<i>Jenkins and others v. Davis and another, imp.</i>	253
Finding supported by evidence. Estoppel.	
<i>Jerenson, Rice v.</i>	248
<i>Jewell v. The Chicago, St. Paul & Minneapolis Railway Company</i>	610
RAILROADS: CONTRIBUTORY NEGLIGENCE: COURT AND JURY. (1) What constitutes contributory negligence: Its effect. (2) When question of contributory negligence for the court. (3) Submitting questions for special verdict.	
<i>Karner, Wylie v.</i>	591
<i>Kelly v. Bliss</i>	187
CONTRACTS: RESCISSION: CONSIDERATION. (1) Rescission of contract by destruction of property. (2) Rights of tenants in common of personalty, not in possession. (3) Consideration for rescission of contract.	
PLEADING. (4-6) Answering amended complaint. When original answer liberally construed.	

<i>Ketchum and others, The Black River Flooding-Dam Association v.</i>	313
<i>Ketchum v. Breed</i>	131
Res Adjudicata.	
<i>Kirby and others v. Corning, Garnishee, and others</i>	599
GARNISHMENT: WAIVER: COSTS. (1) Waiver of formal objections to answer. (4) When claimant interpleading in garnishment entitled to costs.	
REVERSAL OF JUDGMENT: (2, 5) For determinations not affecting injuriously appellant's rights.	
<i>Knight v. Leary</i>	459
EJECTMENT: (1) No adverse possession against government. (2, 3) Proof of entry of land at land office. (3, 4) Unexplained alteration of entry. (5) Force of recitations in patent as evidence. (6) Acquiring additional land, under homestead law, without residence thereon. (7) Alienation by deed before issue of patent. (8, 9) Notary's certificate of acknowledgment of foreign deed of Wisconsin land. (10) <i>Mala fides</i> in purchase. (11) Evidence that grantee holds land in trust.	
<i>Kuhl, Bullard v.</i>	544
<i>La Crosse Booming & Transportation Company and others, The Black River Improvement Company v.</i>	659
<i>Ladwig and another v. Haase</i>	311
Reformation of Lease.	
<i>Lancashire Insurance Company, Spensley v.</i>	433
<i>Leary, Knight v.</i>	459
<i>Lincoln County, Clarke v.</i>	578
<i>Lincoln County, Clarke v.</i>	580
<i>Lockhart v. Geir and another</i>	133
LICENSE TO FLOW LAND. (1) Must be pleaded. (2) May be by parol: revoked by suit.	
<i>Lord v. Devendorf, imp.</i>	491
GENERAL ASSIGNMENT: ATTACHMENT. (1) What provisions in assignment invalidate it. (2) Assignment by one partner of his individual property. (3) Evidence of intent to defraud. (4) What attachment plaintiff must show on traverse of his affidavit. (5) Reversal of decision of court below, on weight of evidence.	

<i>Lormer and others, Gunsolus and others v.</i>	630
<i>Lyle v. Dellinger.</i>	404
Judgment on verdict: Rule as to reversal.	
<i>Manitowoc County, Waldo v.</i>	71
<i>McCaffrey v. The Town of Shields.</i>	645
POOR LAWS. (1, 2) Legal duty of town in which pauper has residence but no settlement. (3) When liable for relief furnished by private person.	
<i>McCulloch, Garnishee, etc., Rumery v.</i>	565
<i>McKernan, The President, etc., of the Village of Platteville v.</i>	487
<i>McKnight, imp., Moon v.</i>	551
<i>McQuaid, Parkinson v.</i>	473
<i>Mehlhop v. Pettibone and wife.</i>	652
CONFLICT OF LAWS. (1) Deed of land, in one state, executed in another state by residents thereof.	
FRAUDULENT CONVEYANCE. (2-5) Exchange of lands: Fraud of one party; remedy of his creditors.	
<i>Messersmith v. Devendorf, imp.</i>	498
<i>Mezchen v. More, imp.</i>	214
SUMMONS. Printed signature.	
<i>Milburn and wife, Houghton v.</i>	554
<i>Miles v. Ogden and another, imp.</i>	573
PAYMENT. (1) Application of payment. (2) Ratification of agent's act in accepting land as payment. (3) Debtor's services for creditor not a payment.	
<i>Milwaukee, Lake Shore & Western Railway Company, Howland v.</i>	226
<i>Milwaukee, Lake Shore & Western Railway Company, Rusch v.</i>	136
<i>Milwaukee, Lake Shore & Western Railway Company, Yorton v.</i>	234
<i>Miracle, Executor, Garnishee, The J. I. Case Threshing Machine Company v.</i>	295

<i>Moon v. McKnight, imp.</i>	551
-------------------------------------	-----

Joinder of Causes of Action.

<i>More, imp., Mezchen v.</i>	214
-------------------------------------	-----

<i>Mowry, Assignee, v. The First National Bank of Baraboo and others</i>	38
--	----

CHATTEL MORTGAGE. (1) Mortgagor's remedy when property cannot be reached. (2) When mortgagee must account for collaterals.

REVERSAL OF JUDGMENT: (3) For errors not injurious to appellant.

<i>Northwestern Telegraph Company, Randall and another, Executors, v.</i>	140
---	-----

<i>Ogden and another, imp., Miles v.</i>	573
--	-----

<i>Orton, In re</i>	379
---------------------------	-----

<i>Parkinson v. McQuaid</i>	473
-----------------------------------	-----

CONSTRUCTION OF DEED: EVIDENCE: VERDICT. (1) Fundamental rule of construction. (2) Rule applied: when a fixed monument (as a post), named in description, must yield to other parts of description. (3) Evidence of agreement of parties to abide by a survey. (4) Instructions to jury. (5) Surplusage in verdict.

<i>Pettibone and wife, Mehlhop v.</i>	652
---	-----

<i>Platteville, The President, etc., of the Village of, v. McKernan</i>	487
---	-----

<i>Potter v. Taggart</i>	395
--------------------------------	-----

PLEADING: PRESUMPTIONS: RESCISSION OF SALE. (1) Demurrer *ore tenus*; presumptions to sustain pleading. (2) Complaint sufficiently alleges fraud in sale. (3) Notice of election to rescind sufficiently alleged. (4) When tender of thing sold need not be shown in action to rescind sale. (5) Effect of omission to aver plaintiff's readiness, etc., to restore property.

<i>Powers v. Dellinger</i>	389
----------------------------------	-----

JUDGMENT ON VERDICT: (1, 2) Reversal of, on evidence.

SALE OF CHATTELS. (3) Contract as to time of payment applied.

<i>President, etc., of the Village of Platteville v. McKernan</i>	187
---	-----

MUNICIPAL ORDINANCES: Selling liquors without license. (1) When prosecution cannot appeal in action for violation of municipal ordinance. (2) Charter provisions superseded by general law.

<i>Putney v. Cutler and another</i>	66
---	----

Tax Deed: Record of seal.

<i>Queen's Insurance Company of London and Liverpool, Hammel v.</i>	72
---	----

<i>Randall and another, Executors, v. The Northwestern Telegraph Company</i>	140
--	-----

NEGLIGENCE: EVIDENCE: ERROR. (1) Evidence of negligence. (2) When principal not bound by agent's admission of negligence. (3) Error in admitting evidence, how cured. (4) Burden of proof as to contributory negligence. (5) Functions of court and jury. (6) What negligence of plaintiff will defeat action. (7) Error in instructions, how cured.

ABATEMENT OF ACTION: (8) By death of party.

<i>Regents of the University of Wisconsin, The State ex rel. Priest v.</i>	159
<i>Rice v. Jerenson</i>	248

APPEAL TO SUPREME COURT. (1) When evidence reviewed: exceptions as to evidence disregarded.

FRAUD. (2) Burden of proof. (3, 4) When finding as to fraud reversed.

ATTACHMENT. (5) Judgment *in personam* not rendered before debt due.

<i>Rowell and another v. Williams, Administratrix, and another, imp.</i>	636
--	-----

MORTGAGE. (1) Recording act: "conveyance;" "good faith." (2) Proof that later mortgagee took with notice of prior mortgage. (3) Mortgage: good as between parties, etc., notwithstanding error in description. (4) Consideration of mortgage. (5) Acknowledgment: defect in form.

Rumery v. McCulloch, Garnishee, etc. 565

GARNISHMENT: GENERAL ASSIGNMENT. (1) *Res adjudicata* by suit against principal debtor. (2) Substitution of debtor. (3, 4) General assignment, defective as against creditors, valid as between parties. Power of one partner as to partnership property. (5) Validity of subsequent assignment by one partner to cure defect in first.

Rusch v. The Milwaukee, Lake Shore & Western Railway Company 136

RAILROADS: CONDEMNATION OF LAND. (1) Occupying land without paying compensation, a trespass. (2) Evidence of land-owner's consent. (3) Ineffectual proceedings to condemn.

Sabotta v. The St. Paul Fire & Marine Insurance Company 687

COURT AND JURY. (1, 2) When court may properly direct a verdict for the plaintiff.

PRACTICE IN SUPREME COURT. (3) Remitting to court below the record on appeal, for correction.

Scales and others, Hardy and another v. 452

Scott, Town of, v. Town of Clayton 499

Sheboygan County v. The City of Sheboygan 415

STATUTE CONSTRUED. "Unpaid taxes" include unpaid special assessments for street improvements.

Sheriffs and others, The Inter-Ocean Transportation Company v. 202

Sherry, Smith v. 114

Shields, Town of, McCaffrey v. 645

Sickler, Trowbridge v. 306

Siegel, The State and another v. 86

Smith v. Sherry 114

RES ADJUDICATA. (1) What questions previously adjudged herein.

TOWNS: BOUNDARIES. (2) Statute as to change of boundaries: in what respects mandatory.

TAX DEEDS: LIMITATION OF ACTIONS. (3) Tax deeds, when mere nullities. (3-5) Limitation of actions on tax deeds.

Spensley v. The Lancashire Insurance Co...... 433

NONSUIT. (1, 4, 5) Circumstances under which peremptory nonsuit will not be ordered.

INSURANCE AGAINST LIGHTNING. (2) Policy construed. (3) Lightning defined. (4) Evidence of destructive effects of lightning in a tornado.

St. Paul Fire & Marine Insurance Company, Evans v. 522*St. Paul Fire & Marine Insurance Company, Sabotta v.* 687*State ex rel. Hudd v. Timme, Secretary of State*..... 318

CONSTITUTIONAL LAW. (1) Mode of amending the state constitution.

(2) When several propositions may constitute one amendment.

(3) Amendment of 1881 valid. (4) When such amendment takes full effect.

State ex rel. Moreland and others v. Whitford..... 150

CERTIORARI. (1) To quasi-judicial officer: what it brings up for review.

CONSTITUTIONAL LAW: STATE SUPERINTENDENT. (1) His power to determine questions relating to division of school districts. (3) His power to make rules for hearing such cases.

State ex rel. Priest v. The Regents of the University of Wisconsin..... 159

UNIVERSITY OF WISCONSIN. Powers of the board of regents in respect to the exaction of fees from students.

State, Baker v...... 368*State and another v. Siegel*..... 86

"Legally laid out roads" defined.

Stilling v. The Town of Thorp..... 528

COUNTIES: HIGHWAYS. (1) When county liable for condition of highway.

EVIDENCE. (2) Reading medical books to jury.

INSTRUCTIONS TO JURY. (3) Must be considered with reference to facts in evidence.

REVERSAL OF JUDGMENT: (4) For admission of improper evidence

<i>Strasser v. Conklin</i>	109
Ratification.	
<i>Sumner v. Sumner, imp</i>	642
DIVORCE. (1) Power of court as to suit money. (2) No abuse of discretion in this case.	
<i>Taggart, Foster v</i>	391
<i>Taggart, Potter v</i>	395
<i>Tallman v. Barnes, imp</i>	181
PLEADING. (1) Complaint construed. (2) Equitable counterclaim in action for trespass. (3) Presumption from pleading.	
TENANTS IN COMMON OF PERSONALTY. (4-6) Their mutual rights as to possession, and their legal or equitable remedies in case of a forcible taking by one of them.	
<i>Tetz v. Butterfield</i>	242
CONTRACTS. (1) Building contract construed. (2) Bad faith in umpire between parties to such contract.	
<i>Thorp, Town of, Stilling v</i>	528
<i>Timme, Secretary of State, The State ex rel. Hudd v</i> ..	318
<i>Town of Clayton, The Town of Scott v</i>	499
<i>Town of Scott v. The Town of Clayton</i>	499
REVERSAL OF JUDGMENT: (1) For misleading instructions.	
COURT AND JURY. (2) When question of fact not to be submitted to jury.	
<i>Town of Shields, McCaffrey v</i>	645
<i>Town of Thorp, Stilling v</i>	528
<i>Trerice and another v. Barteau</i>	99
DEDICATION: ADVERSE POSSESSION. (1) What essential to validity of dedication. (2, 3) Evidence as to dedication, and as to adverse possession.	

<i>Trowbridge v. Sickler</i>	308
FRAUDULENT SALES. (1, 2) Question for jury.	
EVIDENCE. (3) Suppressing deposition for evasive or defective answers. (4) Whether witness may state who was "in possession" of chattels.	
REVERSAL OF JUDGMENT: (5) For want of definite instruction not asked.	
<i>Tucker v. Cole and another</i>	539
PARTNERSHIP. (1) When notice to one partner binds all.	
REVERSAL OF JUDGMENT: (2) For improper remarks of attorney.	
<i>Varney v. Varney</i>	422
DIVORCE. Parties defendant to divorce suit.	
<i>Village of Platteville, The President, etc., of, v. McKernan</i>	487
<i>Waldo v. Manitowoc County</i>	71
County offices.	
<i>Warder and others v. Baker, Garnishee, and others</i>	49
GARNISHMENT. Garnishee's prior admission as estoppel, and as evidence.	
<i>Wausau Boom Company, Borchardt v</i>	107
<i>Week and another, Galloway v</i>	604
<i>Wells, West v</i>	525
<i>West v. Wells</i>	525
SALE OF CHATTEL: Liability of purchaser's agent: Misleading instruction.	
<i>Westchester Fire Insurance Company of New York, Boardman and another v</i>	364
<i>Wheeler & Wilson Manufacturing Company, Ault v</i> ..	300
<i>Whitford, The State ex rel. Moreland and others v</i>	150
<i>Williams, Administratrix, and another, imp., Rowell and another v</i>	636

Winnebago County, Hull v. 291

Wylie v. Karner 591

FORECLOSURE OF MORTGAGE: ISSUES AND FINDINGS: PLEADING:

COUNTERCLAIM: ATTORNEY'S FEES. (1) Whether finding disposes of issue, as to payments. (2) Mortgage construed. (3) Answer: Counterclaim, how pleaded. Whether issue upon counterclaim disposed of. (4) Finding construed. (5) What attorney's fees allowed.

REVERSAL OF JUDGMENT: (4) Only for error injurious to appellant.

Yorton v. The Milwaukee, Lake Shore & Western Railway Company 234

RAILROADS. Stop-over tickets: Rights of carrier and passenger in respect thereto.

CASES DETERMINED

AT THE

January Term, 1882.

DEAN and another, Executors, vs. DEAN and others.

November 28, 1881 — January 10, 1882.

WILLS. (1) *Will construed: "Capital" as distinguished from accrued and undivided profits.* (2) *Costs in actions for construction of wills.*

1. By articles of copartnership between N. D. and T. D., as modified soon after by written agreement, each was to put, and each did in fact put, \$20,000 as capital into the partnership business. By those articles, also, each was entitled to draw out annually his share of the annual profits. None of the "capital" of the firm, nor any of the "accrued but undivided profits," were to be used by the parties except in the business; and, at the dissolution of the firm, each was to draw out the amount of "capital" originally contributed by him, less his share of the losses, if any, and the remainder of the assets was to be divided between them in the manner prescribed for division of profits. A codicil added to N. D.'s will just before his death provides that his executors shall leave in said business, for two years, all his "present capital" therein, and that at the end of the two years they shall receive from T. D. one-half of the net value of his (the testator's) interest in the business, and thereupon execute to T. D. the necessary assignments and conveyances to vest in him all the testator's right, title and interest in said business; the intention being declared to be to vest in T. D. the testator's "entire interest in said business, subject to the limitations and restrictions aforesaid." At the time of N. D.'s death his assets in said business were about \$43,000, of which about \$23,000 were accumulated and undivided profits, in the form of real property, lumber, notes, etc. *Held*, that the fund which the executors are required to leave in said business for two years is only the \$20,000 first above named; there being, in the judgment of

Dean and another, Executors, vs. Dean and others.

this court, no sufficient proof that the remaining \$23,000 had ever been capitalized by agreement of the parties.

2. The suit being by the executors for a construction of the codicil, and the appeal by residuary legatees, *held*, that there was no error in directing the costs of the plaintiffs and of the defendant T. D., and also the costs of the other defendants as between attorney and client, to be paid out of the estate generally, and not out of the assets of the estate in said partnership business; the amount of the residuary fund being necessarily affected by the result of the suit.

APPEAL from the Circuit Court for *Dane* County.

This action was brought by *John S. Dean* and *Lansing W. Hoyt*, as executors of the last will and testament of *Nathaniel W. Dean*, to procure a construction of the codicil to said will. All the legatees named in the will, viz., *Harriet H. Dean*, *Harriet D. Sterling*, *Thaddeus Dean*, *Anna W. Huntley*, and *Maria M.*, *Irving W.* and *Adelaide Dean*, were made defendants.

Three answers were filed: one by *Thaddeus Dean*, one by *Harriet H. Dean*, and one by *Anna W. Huntley* and *Maria M.*, *Irving W.* and *Adelaide Dean*. The contents of the answers need not be stated. The defendant *Harriet D. Sterling* did not answer.

The provisions of the codicil in question, and those of the will so far as they are deemed important here, and the facts in evidence as understood by this court, are sufficiently stated in the opinion.

The circuit court held and adjudged that it was the true intent and construction of the codicil in question, "that the entire sum and interest belonging to said *Nathaniel W. Dean* in the partnership of *Dean Brothers*, and represented on the books thereof by the credits in his favor, amounting to \$43,478.16, should remain invested and in use in the business of said partnership, during the two years next succeeding his death, to aid in carrying on the same; that the plaintiffs, as executors of the last will and testament of said deceased, should during said two years settle for, demand and collect

Dean and another, Executors, vs. Dean and others.

annually one-third of the net profits of said business for the benefit of the estate of said deceased, but that they were not to collect or receive during that time any portion of the said \$43,478.16; that at the end of said two years the plaintiffs, as such executors, are to have a full accounting with the defendant *Thaddeus Dean* in relation to the said business of Dean Brothers up to the time of the death of the testator, and that thereupon they are to receive from him, if he shall pay the same, one-half of the net value of the interest of the said deceased in said partnership and business, and, upon the same being paid, the plaintiffs, as such executors, shall execute and deliver to said defendant *Thaddeus Dean* all proper and necessary assignments and conveyances to vest in him absolutely all the right, title and interest of the testator in and to said business, and the property, rights and assets thereunto belonging;" and that "it was the true intent and meaning of the said testator, by said codicil, to devise and bequeath to the said defendant *Thaddeus Dean* one-half of his entire interest in said business and partnership, subject to the limitations and restrictions aforesaid, in addition to the bequest theretofore made to him in and by said will." The court further adjudged "that the costs of the plaintiffs, of the defendant *Thaddeus Dean*, and of the defendants *Harriet H. Dean*, *Anna W. Huntley*, *Maria M. Dean*, *Irving W. Dean* and *Adelaide Dean*, as between attorney and client, be paid out of the estate of the said testator in the hands of said plaintiffs, the five last named defendants to be allowed but one bill of costs."

From this judgment the defendants *Harriet H. Dean*, *Maria M. Dean*, *Irving W. Dean* and *Adelaide Dean* appealed.

For the appellants there were briefs by *Lamb & Jones*, and oral argument by *Mr. Lamb*:

1. By the words "my present capital," in the codicil, the testator did not refer to something that would fluctuate from

Dean and another, Executors, vs. Dean and others.

month to month or from year to year as his interest in the assets of the firm would inevitably do, but to something which he assumed was known and certain, not needing any explanation, and which would be the same in one, two or three years after the codicil was made, as it then was. The capital fixed by the articles of partnership, as changed by the three letters, was the only capital that could satisfy these necessary conditions. The thing which the executors were authorized by the codicil to allow to remain in the business for two years after the testator's death, was not the capital or assets which he might have at his decease, but only his then present capital — that which he had when the codicil was made. The rule that the will speaks and operates from the testator's death, is never applied where the language of the will refers to an actually existing state of things. 1 Redfield on Wills, 380, 381; *Cole v. Scott*, 16 Sim., 259; O'Hara on Wills, 18; *Cockran v. Cockran*, 14 Sim., 248. The claim of *Thaddeus Dean* confounds all distinction between capital and profits, and would make accrued profits capital by mere silence of the parties. But the testator, in the very sentence in which the words "my present capital" are used, directs what shall be done with profits and net profits of the business, and discriminates between capital and profits with clearness and precision. See *Sparrow v. Josselyn*, 16 Beav., 135. The rule that in equity partners may be held to have modified their written articles of partnership by courses of dealing, is not a rule primarily applicable in the construction or enforcement of agreements. It is only when it is clearly shown that parties have so wholly ignored the provisions of their written agreement that the court can safely say they never intended to enforce them, that it is adopted and enforced, and then only to prevent wrong and failure of justice. It is never applied for the purpose of preferring one legatee against the legal heir or against another legatee. Had there been no codicil, the partnership business must have ceased at the death of the testator. Parsons on

Dean and another, Executors, vs. Dean and others.

Part., 388-394, 438, 443, 447; *Darling v. March*, 22 Me., 184. Every provision for its continuance was of grace, and could not have been had of right. There is, therefore, no hardship or injustice here to the surviving partner, to be prevented by holding the articles modified. 2. The widow of the testator was his sole heir-at-law, and entitled, if he died intestate, to inherit the entire estate. The heir is not to be disinherited without an express devise or necessary implication. If the construction is doubtful, the law leans in favor of a distribution as conformable to the general rules of inheritance as possible. *Lynes v. Townsend*, 33 N. Y., 561; *Van Kleeck v. Reformed Dutch Church*, 6 Paige, 600; *Areson v. Areson*, 3 Denio, 458; *Roe v. Blackett*, Cowp., 235; 1 Bro. C. C., 441; *Moon v. Heaseman*, Willes, 141; *Hay v. Earl of Coventry*, 3 Term, 83, 86; *Moor v. Denn*, 2 Bos. & Pull., 247; *Wheaton v. Andress*, 23 Wend., 452; Williams on Executors, 1166 (1088), note; *France's Estate*, 75 Pa. St., 220; *Amelia Smith's Appeal*, 11 Harris, 9; *Quinn v. Hardenbrook*, 54 N. Y., 83; *Van Kleeck v. Dutch Church*, 20 Wend., 457; *Bender v. Dietrick*, 7 W. & S., 284; 12 Ga., 155; 35 Pa. St., 393; 2 Jarman on Wills, 741. 3. The costs, as between attorney and client, should be paid out of the fund in controversy. When a particular and separate part of a testator's estate involves the construction of his will, the expense of ascertaining the proper construction of that part of the will relating to such separate portion of the estate, must be borne by that portion, and not by the general estate, or the residue. 1 Redf. on Wills, 495, 496; *Martineau v. Rogers*, 8 DeG., M. & G., 328; *Att'y General v. Lawes*, 8 Hare, 32; *Jenour v. Jenour*, 10 Vesey, Jr., 562.

For the respondent *Thaddeus Dean* there were briefs by *Pinney & Sanborn*, and oral argument by *Mr. Pinney*:

1. The ninth and tenth clauses of the partnership articles, as to the amount each partner was to be at liberty to draw out each month, and as to paying over annual profits when ascer-

Dean and another, Executors, vs. Dean and others.

tained, were never acted upon or put in use. Each of the partners from time to time drew out such sums as he saw fit, and left, so far as he could, all funds and means in the business in order to carry it on more successfully and profitably. At the end of each year, when the year's profits were estimated and apportioned, the share of each partner was carried to his credit upon the account of his contributions. These estimated profits consisted, in fact, of goods and chattels, notes and real estate belonging to the firm, in an undivided condition, and were left in the business in order better to carry on and extend the same. These clauses have therefore been waived by the course of dealing of the parties, and by their mutual acquiescence for years, and it would be inequitable now to put them in force. The articles should be read as though such clauses had been expunged. *Story on Part.*, § 191; *Collyer on Part.*, §§ 209, 210; *Parsons on Part.*, 238; *Const v. Harris*, Turn. & Russ., 496, 523; *England v. Curling*, 8 Beav., 129; *Coventry v. Barclay*, 2 DeG., J. & S., 327; *Jackson v. Sedgwick*, 1 Swanst., 460. That portion of the estimated profits, declared before the testator's death, and carried to his credit, which he allowed to remain in the business as a basis of carrying it on, had become capitalized, and must be taken and regarded as capital. *Straker v. Wilson*, L. R., 6 Ch. App., 503, 510; *Parsons v. Hayward*, 4 DeG., F. & J., 478. It is not necessary that there should have been any express resolution or agreement of the partners to accomplish this result, nor that these sums thus credited and used should have become technically and at law a part of the capital of the firm. It is enough that it appears that they are advances by one partner for the use of the firm in its business, and have been so dealt with and regarded. Such sums pass under the name of "capital." *Bevan v. Attorney General*, 4 Giffard, 361; *Terry v. Terry*, 33 Beav., 232. These sums, therefore, fall within the designation of "my present capital," in the codicil, which the testator directed to remain in the business for two years after his decease. By

Dean and another, Executors, vs. Dean and others.

“present capital” he meant all that would be coming to him at the time of his death, and from death the will was to speak and operate. Of this meaning there can be no doubt, after the explicit designation of the extent of the bequest, as “one-half of my entire interest in the business,” three times repeated in the codicil. 2. This is not a controversy between a legatee and heirs as such. The widow cannot claim or take a single item of the estate as heir or by descent. She and her co-legatees take under the residuary clause of the will. She is before the court as a legatee, insisting on the will, and there is therefore no question in this case as to disinheriting heirs. 3. The costs were properly charged against the estate. This is not a case where the legacy has been so severed from the general estate that the latter is not affected by the suit. As this controversy is decided one way or the other, the general estate will be correspondingly increased or diminished.

For the executors there was a brief by *Sloan, Stevens & Morris*, and oral argument by *Mr. Sloan*. They argued in general support of the view taken by the appellants.

COLE, C. J. This action is brought by the plaintiffs, as executors, to obtain a construction of the codicil to the will of N. W. Dean, who died February 28, 1880. The will was dated February 29, 1876, and makes a full disposition of the testator's estate, both real and personal. After the payment of certain legacies named, the testator directed his executors to divide the rest and residue of his estate into six equal parts, which were to be paid to the persons named, in the proportions specified. The testator expressed the wish, in the last clause of the will, that his estate should be closed up as rapidly as the best interests of the estate would permit, and that all of the legacies (except one) should be paid as soon as funds could be realized for their payment. There is no controversy as to the proper construction of the will, and we need not further give its provisions. The codicil bears date February 23, 1880. On

Dean and another, Executors, vs. Dean and others.

May 1, 1871, the decedent and his brother *Thaddeus Dean* entered into partnership in the business of dealing in lumber in the city of Chicago, which partnership was continued to the death of N. W. Dean. The will makes no express reference to this partnership business. But the codicil, after reciting that this partnership business had hitherto been profitable to the testator, which was largely due to the business capacity and integrity of his brother *Thaddeus*, contains this language: "And being desirous of showing my appreciation thereof, and that the business so commenced should be maintained and carried on, I hereby direct my said executors to allow my present capital in said business to remain for the period of two years after my decease, collecting and receiving annually, from my said brother *Thaddeus*, the net profits arising from said business, under my agreement with him, belonging to me, for the benefit of my estate. At the expiration of two years, it is my will and I direct that my said executors have a full settlement and accounting with my said brother *Thaddeus* in relation to said business, and that thereupon they collect and receive from him one-half of the net value of my interest therein, and, upon the payment by him of the one-half value so ascertained, I instruct and direct my said executors to execute and deliver to him all proper and necessary assignments and conveyances so as to vest in him absolutely all my right, title and interest in the business aforesaid; it being my intention, in addition to the bequest heretofore made to him in my said will, to bequeath and devise to him one-half of my entire interest in said business, subject to the limitations and restrictions aforesaid."

The articles of copartnership, to which reference is made in the codicil, are quite full and specific. They provide, among other things, that each partner should contribute \$15,000 to the capital of the firm, which was to be used in carrying on the copartnership business; that *Thaddeus Dean* was to have the management of the business; and that he should be en-

Dean and another, Executors, vs. Dean and others.

titled to receive two-thirds of the profits, and N. W. Dean one-third thereof. The losses were to be borne in the same proportion. Books of account were to be kept, wherein all of the transactions of the firm should be entered, which books should be open to the inspection of each partner at all times. By the ninth clause it was provided that N. W. Dean was to take out of the cash of the company's funds \$125 per month for his own use, and *Thaddeus Dean* \$250 per month, providing these sums could be so drawn out by the respective parties without impairing the capital of the firm; but neither partner was to take a greater sum for his own use during any month without the written consent of the other. The tenth clause provided that *Thaddeus Dean*, at the end of each year, and oftener, if need were, on request, should make and render to N. W. Dean a just and true account of all the gains and profits, as well as losses, of the business, and of all things done on behalf of the partnership; and, this account being so made, he was to pay N. W. Dean his proportionate share of the profits, and take to himself his own share. In the eleventh clause it was provided that during the continuance of the copartnership none of the capital of the firm, nor any of the accrued but undivided gains and profits thereof, should be used or employed by the parties thereto for any other purpose than carrying on said business; in the twelfth, that at the end of the copartnership a final accounting should be had, and all the debts of the firm should be first paid, and then each should draw out the amount of capital originally contributed by him, diminished by his proportionate share of losses, if any; the balance, if any, to be divided as provided for dividing profits. These are the material provisions of the copartnership agreement.

From three letters which were introduced on the hearing — one written by *Thaddeus Dean*, the other two by N. W. Dean — it appears that each party agreed, in July, 1872, to increase his capital to \$20,000, and did so. And it further appears,

Dean and another, Executors, vs. Dean and others.

from the annual statement made of the partnership business, that at the end of each partnership year each partner was credited on the books of the concern with his share of the profits, and was charged with the amount which he had drawn out during the year. The accumulated but undivided profits of the business consisted almost wholly of real estate, lumber, notes, book accounts, and other personal property belonging to the firm. The amount standing to the credit of N. W. Dean at the time of his death, including his capital of \$20,000, was \$43,478.16. Or, to speak more accurately, that sum embraced the profits standing to the credit of N. W. Dean on the books of the firm at the time of his death, and also the unascertained profits which had accrued since the last annual statement of May 1, 1879, down to that time.

The question arising upon the codicil, which the executors request the aid of the court in determining, is, what is the amount which they must leave in the partnership business for two years, and which, at the end of that period, they are directed to assign and convey to *Thaddeus Dean* upon his paying one-half of its ascertained net value; the annual profits having been collected by them in the mean time. On the part of the residuary legatee *Thaddeus Dean*, it is claimed, that it was the intention of the testator that his entire interest in the partnership business should remain in the business, including both his capital of \$20,000 and all accumulated but undivided profits belonging to him under the partnership agreement; while, on the part of other residuary legatees, it is insisted that it was his capital only which was to be left in the business. Considerable proof was taken on the hearing relating to the acts of the parties and their course of dealing, for the purpose of aiding the court in arriving at the intention of the testator in making the codicil. But, aside from the articles of copartnership, this evidence furnishes but little assistance in construing the codicil. The intention of the testator must therefore be ascertained from the language of the codicil

Dean and another, Executors, vs. Dean and others.

itself, read, of course, in the light of the written agreement to which it refers.

On looking at the language of the codicil itself, the first thing which will be noticed is, that the testator, in the introductory part, speaks of his "*interest*" in the business, which has been profitable to him. Being desirous that the business so commenced should be maintained and carried on, he directs his "executors to allow *my present capital* in said business to remain for the period of two years after my decease, collecting and receiving annually from my said brother, *Thaddeus Dean*, the net profits arising from said business, under my agreement with him, belonging to me, for the benefit of my estate." It will be seen that the mind of the testator was fixed at the outset upon his entire interest in that business as distinguishable from his capital therein. If he intended that his entire interest should remain, it is singular that he changed his language, using words which convey a different meaning. The terms "*interest*" and "*present capital*" are not equivalent expressions, and do not convey the same idea in the connection in which they are used. If the testator intended that his entire interest in the business should remain, it is remarkable that he changed his phraseology. But this is not all: The executors are directed to collect annually from his brother *Thaddeus* the net profits arising from the business under the partnership agreement, which belonged to him, for the benefit of his estate. If the codicil is construed, as it must be, in connection with the partnership agreement, there is no difficulty in getting at the intention of the testator, for the agreement makes a plain and broad distinction between capital and profits. The former is devoted to the partnership business, but provision is made for withdrawing the latter from time to time. Therefore we think the word "*capital*," as used in the codicil, must be understood as meaning the same thing as when used in the agreement; it means the capital as opposed

Dean and another, Executors, vs. Dean and others.

to profits, and the word "profits" means the gains upon the capital invested in the business.

The testator further directs that when a final settlement is made or accounting had, the executors shall convey to his brother, upon payment by him of one-half of its ascertained value, all his right, title and interest in the business, declaring that it is his "intention, in addition to the bequest heretofore made to him in my said will, to bequeath and devise to him one-half of my entire interest in said business, subject to the limitations and restrictions aforesaid." If the qualifying words, "subject to the limitations and restrictions aforesaid," were omitted, this clause of the codicil would tend strongly to warrant the inference that it was the intention of the testator that his entire interest in the business should remain for two years, and then be disposed of as directed. But, as the clause stands, in view of the previous language, where the words "interest" and "capital" are used in a different sense, more especially in consideration of the fact that the whole codicil is to be construed in connection with the written agreement, no such inference or presumption can fairly be made; for the agreement, in its terms, so clearly and distinctly discriminates between capital and profits that it is impossible to hold that the testator, by the words "my present capital," intended to designate not only the capital proper which he had contributed to the business, but also all the accumulated and undivided profits which had accrued from the use of that capital. If he had intended to direct that his whole interest in the business should remain two years, or if he regarded his entire assets therein as capital, his intention or understanding would have been made manifest by the use of language different from that employed.

But, as observed by counsel who argue in favor of the view we have taken of the meaning of the codicil, the testator, in the very sentence in which the words "my present capital"

Dean and another, Executors, vs. Dean and others.

occur, directs what shall be done with the "net profits" of the business, and pointedly makes a distinction between capital and profits, thus showing that the two things were separate in his mind. The intention of the testator must prevail, if it is possible to gather it from the language of the entire codicil. That intention was to allow his capital to remain in the business two years, but nothing more. This construction of the codicil is vigorously combated by the learned counsel for *Thaddeus Dean*, because, as he says, if the accumulated profits of the parties were withdrawn it would so cripple the business that it could not be carried on with the success and profit which had theretofore attended it. But this argument, under the circumstances, is entitled to but little weight; for, if there had been no provision for continuing the business, it would have had to be closed up on the death of N. W. Dean. Its continuance, therefore, was a favor, and could not have been claimed as a right by the surviving partner.

But the same counsel further insisted that the written agreement had been essentially modified or changed in some of its provisions by the acts and course of dealing of the parties. He says the proof shows that the accrued but undivided profits which stood to the credit of the partners on the books of the firm had been converted into capital, or had been treated as capital, so that they would be included in the phrase "my present capital," as used by the testator. We do not think this position is sustained by the proofs in the case. It was certainly competent for the parties to modify or entirely set aside the provisions of the written agreement. But what is the evidence that they did so? In respect to the amount which each partner contributed to the capital of the firm, there was undeniably a change. The provision for drawing out the profits monthly does not seem to have been acted on at all. The same remark is true in respect to the tenth clause of the articles, which bound *Thaddeus Dean*, at the end of each year, to pay N. W. Dean his share of the profits, and take to

Dean and another, Executors, vs. Dean and others.

himself his own share. But we fail to find any proof which warrants the assumption that the accrued but undivided profits were converted into capital, whether by express agreement or by long acquiescence of the parties. On the contrary, we have no doubt of the right of the partners to withdraw these profits from the business whenever they chose to do so. The business was very profitable; these profits could be advantageously used in it; and the parties permitted them to be so used when not withdrawn. But the annual statements show that the testator, in the eight full years which the partnership continued, overdrew his profits in three of the years, the last time being the last full year. Also that *Thaddeus Dean* overdrew his profits in five out of the eight years, including the last year. In view of these well-established facts, what becomes of the contention of *Thaddeus Dean*? The burden obviously was upon him of showing, by clear and satisfactory evidence, that the partnership articles had been modified or laid aside; that the provision in regard to the amount contributed by each partner to the capital stock had been superseded; that undivided gains and profits had been transformed into capital; that all this was so well understood by the parties, that when the testator speaks of "my present capital" we must presume he meant his entire interest, including both capital and profits; and that when he directs that the "net profits" arising from the business should be annually collected from *Thaddeus Dean*, which belonged to him "under my agreement with him," he referred to some agreement other than the written one. For to this extent does the claim of *Thaddeus Dean* go; and it seems to us quite untenable. It is true, as we have remarked, that the profits not withdrawn by the partners were used in the business. But this was entirely consistent with the eleventh clause of the agreement, which contemplates such use. But that falls far short of proving that the profits were capitalized either by express agreement or by the silent acquiescence of the parties. We have examined all of the authorities relied on by the

Dean and another, Executors, vs. Dean and others.

learned counsel in support of the position that profits declared and credited on the books of the firm to each partner may be so treated as to fall within the designation of capital; but they throw little light on the question before us. We do not deem it necessary or useful to specially notice these authorities, as the views which we have expressed as to the proper construction of the codicil do not conflict with any doctrine or principle laid down in them.

The only other matter we deem of sufficient importance to be noticed, is the question of costs. The circuit court adjudged that the costs of the plaintiffs and of the defendant *Thaddeus Dean*, and also the costs of the other defendants as between attorney and client, be paid out of the funds of the estate; the five last-named defendants to be allowed but one bill of costs. The counsel for the last-named defendants insists that this is inequitable; that the costs should be paid out of the assets of the estate in the partnership business. He says that it was only that fund which was in controversy, therefore it should bear the whole expense of the litigation. The cases of *Att'y Gen. v. Lawes*, 8 Hare, 32; *Martineau v. Rogers*, 8 DeG., M. & G., 328; *Jenour v. Jenour*, 10 Vesey, Jr., 562, are relied upon in support of this position. These cases do recognize and apply the rule that where the litigation relates to a legacy which has been severed from the bulk of the estate, that particular fund, and not the general estate, is chargeable with the costs. But that rule cannot apply here, for reasons suggested by the opposing counsel. This is not a case where the legacy or matter in litigation has been so severed from the general estate that the general estate is not affected by the suit. The residuary fund to be distributed is increased or diminished as one construction of the codicil or the other is adopted. Our construction makes that fund more than it would be under the decision of the circuit court. It seems to us there is no reason for departing from the rule laid down in *Heiss v. Murphey*, 43 Wis., 45; *Will of Meurer*, 44

Mowry, Assignee, vs. The First National Bank of Baraboo and others.

Wis., 392; and *Dodge v. Williams*, 46 Wis., 72, where the costs were paid out of the estate.

It results, from the views expressed, that the judgment of the circuit court, placing a construction upon the codicil, and giving directions to the executors in regard to the proper execution of their trust, is erroneous. The judgment must therefore be reversed, and the cause remanded with directions to enter a judgment in accordance with this opinion.

By the Court.— So ordered.¹

MOWEY, Assignee, vs. THE FIRST NATIONAL BANK OF BARABOO and others.

November 29, 1881 — January 10, 1882.

CHATTEL MORTGAGE. (1) *Mortgagor's remedy when property cannot be reached.* (2) *When mortgagee must account for collaterals.*

REVERSAL OF JUDGMENT: (3) *For errors not injurious to appellant.*

1. Where mortgaged property has been sold or used by the mortgagee, or its condition changed, so that it cannot be restored to the mortgagor, the only relief available to the latter in an action to redeem is to have an accounting and be allowed the value of the property when taken from him.

¹ On the 5th of April, 1882, the following order was entered in the above cause, in this court:

"Upon motion of the appellants by their attorneys: It is now here ordered and adjudged by this court that the costs to be awarded by the circuit court to be paid out of the assets of said estate to the several parties to this action who have appeared herein, be and are hereby restricted to taxable costs and disbursements, and but one bill of costs and disbursements be allowed to the parties, *Harriet H. Dean, Maria M. Dean, Irving W. Dean, and Adelaide Dean*, who appeared by the same counsel; but this direction is not intended to embrace or control the matter of fees which said executors shall pay their counsel, etc. A copy of this order to be attached to the opinion and returned with the remittitur."

Mowry, Assignee, vs. The First National Bank of Baraboo and others.

2. Where the mortgagee of chattels subsequently received from the mortgagor collateral security, and then, after disposing of the mortgaged property in such a manner as to render him liable to account to the mortgagor, sold the collaterals: *Held*, that if it shall appear on an accounting that the mortgaged property was equal in value to the mortgage debt, the sale of the collaterals must be treated as unauthorized, and the mortgagee must account for their actual value.
3. Where a plaintiff is granted all the relief which he demands, or to which he is entitled, he cannot complain because it is granted upon grounds different from those for which he contends.

APPEAL from the Circuit Court for *Sauk* County.

This action was brought to determine the rights of the plaintiff in and to a large amount of chattel property and notes mortgaged and pledged by his assignor, the Wonewoc Manufacturing Company, to the Reedsburg Bank (which is a banking copartnership composed of the defendants *D. B. Rudd, E. O. Rudd, Greene, Geffert and Lusk*), and to the defendant the *First National Bank of Baraboo*.

The record is very voluminous. The following is a statement of the case as the same appears in the pleadings, proofs, findings of fact and judgment:

The Wonewoc Manufacturing Company was organized and became a corporation in May, 1877. In June and July, 1879, it borrowed \$7,000 of the Reedsburg bank, and to secure payment thereof executed to that bank a mortgage in the usual form, dated July 24, 1879, on "all the personal property, of every kind and nature, belonging to the said Wonewoc Manufacturing Company, situated in and about their wagon factory at Wonewoc, and in and about their steam-mill at Woodland, called the 'Valley mill,' including and intending to mortgage all the stock of said company in the rough, unfinished, partly finished, finished, dried and undried wood, iron, tools, implements and machinery, not real estate; also, office safe and furniture, teams and wagons; excepting only from the personal property of said company manufactured goods ready for market, completely finished for sale."

Mowry, Assignee, vs. The First National Bank of Baraboo and others.

Between July 24, 1879, and January 27, 1880, the Reedsburg bank loaned the manufacturing company other large sums of money, on which, at the date last named, the company owed the bank over \$7,000 in addition to the debt secured by the mortgage. To secure the debt which thus accrued after the execution of the mortgage, the company pledged to the bank a large number of promissory notes made by the customers of the company, and amounting, in the aggregate, to about \$17,000.

In February, August and October, 1879, the defendant the *First National Bank of Baraboo* loaned to the manufacturing company sums of money amounting in the aggregate to over \$11,000. To secure such loans, the company pledged to the bank notes of its customers for over \$17,000 in the aggregate. When the first collaterals were delivered, the company gave the bank authority, in writing, to sell them in case of default. The evidence tends to show, and the circuit court found, that a similar authority was given by the company, by parol, in respect to all the collaterals so pledged to the Baraboo bank.

January 31, 1880, the manufacturing company executed a chattel mortgage to the Baraboo bank to secure the unpaid balance (then being nearly \$10,000) on the above loans, which mortgage contains the same description of property as is contained in the mortgage to the Reedsburg bank, and is made subject to it. Neither mortgage contains any stipulation affecting after-acquired property. The manufacturing company continued its business after the execution of the mortgage to the Reedsburg bank, the same as before; manufactured large quantities of the material so mortgaged into wagons, and sold the same, and purchased other large quantities of materials of the same kind and description for future use. Hence, although both mortgages contained the same description of the property mortgaged, the mortgage to the Baraboo bank covered much after-acquired property not included in that to the Reedsburg bank.

Mowry, Assignee, vs. The First National Bank of Baraboo and others.

February 5, 1880, the manufacturing company, having become pecuniarily embarrassed, probably insolvent, duly and regularly assigned all of its assets to the plaintiff in trust for the benefit of its creditors. The plaintiff immediately thereupon qualified as such assignee in the manner required by the statute, and at once entered upon the duties of the trust. On the day following he took possession of the assigned property, including the property described in the aforesaid mortgages.

Afterwards, on February 6 and 7, 1880, the two banks, the mortgagees, acting together, took possession of the mortgaged property for the purpose of selling the same and foreclosing the interest therein of the mortgagor and its assignee.

Thereupon an agreement in writing, dated February 7, 1880, was entered into between the two banks of the one part, and several creditors of the manufacturing company, who had become sureties to the banks for the payment of a part or the whole of such mortgage debts (among whom were the defendants *Nathan Fisk* and *Reuben Fisk*), of the other part, in and by which agreement the banks appointed the defendant *Nathan Fisk* their agent to care for the property, and to sell the same to the best possible advantage, subject at all times to the direction of the Reedsburg bank, or its attorney, the defendant *Lusk*. In consideration whereof, the other parties to the agreement agreed to save the banks harmless from all loss they or either of them might sustain by so doing, and that the net proceeds of the property, as fast as sold, should be applied to the payment of the mortgage debts in the order of priority. Upon this agreement the plaintiff, as assignee of the manufacturing company, indorsed his approval, and *Nathan Fisk* entered upon the discharge of his duties under such appointment. He sold but little of the property, and made but little effort to sell it.

March 6, 1880, the two banks entered into a written agreement with the defendants *Nathan Fisk*, *Reuben Fisk* and

Mowry, Assignee, vs. The First National Bank of Baraboo and others.

Mrs. Sage, in respect to the mortgaged property. By the terms of that agreement, as written, in consideration of \$22,868, for which sum the three defendants last named made their promissory note to the banks, and which was the amount claimed to be due them in the aggregate from the manufacturing company, the banks sold and transferred to such last-named defendants "all of the personal property of the Wonewoc Manufacturing Company included in and covered by the said chattel mortgages, and all our [the banks'] right, title and interest in and to the said property included in and covered by said mortgages; also our right, title and interest in and to any of the personal property of the Wonewoc Manufacturing Company." The instrument further provided that the banks might retain the securities held by them as collateral to the original debts (but included in the transfer to the defendants *N.* and *R. Fisk* and *Mrs. Sage*), as collateral security for the payment of their note of \$22,868.

The testimony tended to prove, and the circuit court found, that there was no agreement by the Baraboo bank to sell under its mortgage, and that the written agreement of March 6th does not correspond with the actual agreement of the parties in that particular. The court seems to have held that the latter bank conveyed only its interest in the mortgage and mortgaged property, instead of making an absolute sale of such property.

Immediately after March 6th the purchasers under the agreement of that date proceeded to work up the materials mortgaged, and to sell the same, so that but little thereof remained on hand at the time of trial. Such purchasers also organized themselves with a copartnership under the designation of the "Wonewoc Wagon Company," and June 1, 1880, sold a large share or interest in the property and business of the company to *M. H.* and *William Case*.

This action was commenced in April, 1880. On June 29, 1880, the Wonewoc Wagon Company sold at public auction,

Mowry, Assignee, vs. The First National Bank of Baraboo and others.

upon due notice, all of the uncollected collaterals theretofore pledged by the manufacturing company to the Baraboo bank. One Briggs became the purchaser of such collaterals, for \$4,250. The bank had theretofore collected on such collaterals nearly \$1,900.

The circuit judge filed findings of fact and conclusions of law, pursuant to which judgment was duly entered. This judgment is preliminary to and the basis for an accounting between the parties, which is therein ordered.

To understand fully and correctly the questions in controversy on this appeal, and the findings and decisions of the circuit judge thereon, it seems necessary to insert here the whole judgment. Exhibit A, mentioned therein, is a list of the collaterals pledged to the Reedsburg bank, and exhibit B of those pledged to the Baraboo bank. The judgment is as follows:

"It is considered and adjudged that the equity of redemption of the property covered by the said chattel mortgages mentioned in said complaint and finding has not been foreclosed, and that the defendants are liable to account for the value of the property covered by both mortgages, and of which they took possession February 7, 1880, at the time they so took possession of the same, deducting therefrom the indebtedness due on both said mortgages; that the sale of March 6, 1880, amounted only to a sale and transfer of the mortgage interest of the mortgagees named in said finding, in the property covered by their said mortgages, and not to a foreclosure of either of them; [and that no sale was made, or attempted to be made, on the mortgage to the *First National Bank of Baraboo*, and that none was effected on the separate property covered by the other mortgage.]

"And it is further considered and adjudged that the defendants the *First National Bank of Baraboo*, *Nathan Fisk*, *Reuben Fisk*, and *Mary E. Gale Sage*, account to said plaintiff for the sum of \$1,886.38, collected on said collaterals men-

Mowry, Assignee, vs. The First National Bank of Baraboo and others.

tioned and described in said Exhibit B, and for the sum of \$4,250, realized from the sale of such as were sold June 29, 1880, to P. R. Briggs; [and that such sale was valid and rightfully made, and extinguished the right, title and interest of said plaintiff in and to the collaterals so sold.]

“And it is further considered and adjudged that the defendants *D. B. Rudd, E. O. Rudd, J. L. Greene, Henry Geffert and James W. Lusk*, and *Nathan Fisk, Reuben Fisk and Mary E. Gale Sage*, have the right to hold the collaterals mentioned in said Exhibit A, and to collect the same, until the debt for which they were pledged shall be fully paid; and that upon the payment of any balance due on said debt the said plaintiff will be intitled to such as are uncollected; [that the defendant *Nathan Fisk* was the agent of the mortgagees named in the chattel mortgages only; that the agreement by which he became such agent did not postpone the right of the mortgagees or either of them to take possession of said mortgaged property at any time; and that he was not the agent of the said mortgagor or its said assignee.]

“And it is further considered and adjudged that it be, and hereby is, referred to J. M. Morrow, Esq., of Sparta, Wisconsin, as sole referee, to ascertain and report — *first*, the value of the property covered by said chattel mortgages, and each of them, on February 7, 1880, and on March 6, 1880, to the end that the same may be more fully and definitely ascertained, and also the value at said times of the collaterals mentioned and described in said exhibits A and B, to be stated separately; *second*, what sum or sums were collected or realized from the sale of the property by *Nathan Fisk* while he was acting as such agent as aforesaid, and the expenses of sale and collection; *third*, what amount was due to the defendants constituting the banking partnership called the Reedsburg bank, for principal sum and interest, February 7, 1880, and also on March 6, 1880, on the debt secured by their said chattel mortgage; and also what amount was due to the *First National Bank of Baraboo*

Mowry, Assignee, vs. The First National Bank of Baraboo and others.

for principal and interest, on the 7th day of February, 1880, and also on the 6th day of March, 1880, on the debt secured by its chattel mortgage, and for which the collaterals mentioned in said Exhibit B were deposited as collateral security; *fourth*, what amount was due to them, on each of said days above mentioned, for principal and interest on the notes for which the collaterals mentioned in exhibit A were pledged as security, and what amount they have collected on such collaterals since February 7, 1880; *fifth*, which of the collaterals described in said Exhibit B remained on hand uncollected on June 29, 1880, and were sold, as stated in said finding of facts, to P. R. Briggs, and the value thereof; and that, upon the coming in of said referee's report, final judgment be rendered thereon, according to law, and that all other questions be reserved until the coming in of said report."

The plaintiff appealed from those portions of the judgment inclosed in brackets.

For the appellant there was a brief by *Pinney & Sanborn*, and oral argument by *Mr. Pinney*.

J. W. Lusk, for respondents.

LYON, J. The object and purpose of this action is to obtain an adjudication that the plaintiff, as assignee of the mortgagor, has an equity of redemption in the property mortgaged and pledged by his assignor, the manufacturing company, to the two banks respectively. Except as to the notes pledged to the Baraboo bank and sold to Briggs, the judgment fully establishes such equity of redemption in the plaintiff; for it determines that there has been no effectual foreclosure of either mortgage, and adjudges that the defendants must account to the plaintiff for the value, at the time of seizure, of the mortgaged property seized by the two banks, February 7, 1880. The collaterals pledged to the Reedsburg bank, which remain uncollected, are still in the possession and under the control of that bank, subject to the final judgment of the

Mowry, Assignee, vs. The First National Bank of Baraboo and others.

court, which will fully protect the rights and interests of the plaintiff therein.

The mortgaged property having been sold or used, or its condition so changed that it cannot be restored to the plaintiff on payment of the mortgage debts, the only relief available to him is to have an accounting of, and to be allowed the value of, the property when the same was taken from him. The judgment fully secures to him that relief.

The plaintiff contended on the trial, and here, that the sale of March 7th, by both banks, to the defendants *Nathan* and *Reuben Fisk* and *Mrs. Sage*, was and was intended to be an absolute sale of the mortgaged property, and not merely a sale of the mortgages and the mortgagee's interest in the property; also, that such sale was invalid, because one of the purchasers, *Nathan Fisk*, was the agent of the creditors of the manufacturing company, and could not become a purchaser of the property in his own right; also, because the agreement of February 6th, between the banks and the creditors, bound the banks to another mode of disposing of the property, and because the sale was (as is claimed) secret, clandestine, and for an inadequate consideration, and hence was fraudulent as against the plaintiff, who represents the creditors of the manufacturing company.

These propositions were urged in support of the claim that the plaintiff still had, notwithstanding the sale of March 7th, an equity of redemption in the property, and was and is entitled to an accounting for its value at the time it was taken from him. The learned circuit judge, in his findings, negatived all these propositions; yet on other grounds the judgment fully sustains the claim of the plaintiff in support of which they were urged. The plaintiff obtains all that he claims, and it seems quite immaterial whether the judgment is rested upon the grounds maintained by him, or upon other grounds. The result is the same in either case. If, therefore, the court erred in negating the foregoing propositions, or either of them, the

Mowry, Assignee, vs. The First National Bank of Baraboo and others.

error did not prejudice the plaintiff, and is not good cause for disturbing the judgment. These observations dispose of all questions presented by this appeal save one, which will now be considered. The circuit court adjudged that the sale to Briggs of the collaterals pledged to the Baraboo bank "was valid and rightfully made, and extinguished the right, title and interest of said plaintiff in and to the collaterals so sold," and that in the accounting the proceeds of such sale should be allowed to the plaintiff. The judgment binds the plaintiff absolutely and unconditionally by that sale, and limits the amount that he can ever realize, under any circumstances, on account of such collaterals, to the sum paid by Briggs therefor. We think the judgment in this particular is premature and may be erroneous.

If it should appear in the accounting that the property mortgaged to the Baraboo bank was, when seized, of a value equal to the debt which it was given to secure, the debt was thereby paid, and the collaterals, pledged to secure the same debt, belonged to the plaintiff and should have been delivered to him. In that case the bank ceased to have any lien upon the collaterals, and had no right or authority whatever to sell them.

The learned counsel for the plaintiff very earnestly maintains that the value of such property not included in the mortgage to the Reedsburg bank is sufficient to pay the whole mortgage debt. But, however that may be, a provision should not be retained in the judgment which might prevent the plaintiff from recovering the full value of the collaterals sold to Briggs, in case it shall be found that the mortgage debt was satisfied before the sale of the collaterals.

We think the testimony sufficient to support the finding of the court that the manufacturing company authorized a sale of all the collaterals pledged to the Baraboo bank, in case of default in payment of the mortgage debt. If it turns out, therefore, that any portion of the mortgage debt remained un-

Mowry, Assignee, vs. The First National Bank of Baraboo and others.

satisfied when such collaterals were sold, that would demonstrate that the sale was properly made. The sale to Briggs seems to have been fairly made, and on due and sufficient notice. If the manufacturing company was then in default on any portion of the mortgage debt, it would result that the sale was valid and binding upon the plaintiff, and he could only be allowed in the accounting the sum for which the collaterals were sold. In that event the judgment in its present form would be correct. But until the fact that there was no such default is made to appear, the clause of the judgment under consideration endangers the rights of the plaintiff, and should be expunged. We must therefore reverse that part of the judgment, without prejudice, however, to the right of the court, after the accounting, to incorporate it in the final judgment if it shall be found that there was a default upon the mortgage debt or any part of it when the collaterals were sold.

It does not seem to be questioned that, in any event, Briggs took a good title to the collaterals purchased by him. We are inclined to think that he did. The plaintiff seems satisfied to pursue his remedy against the defendants, who disposed of the collaterals, and who are, doubtless, abundantly responsible for any judgment that may be recovered against them.

It is only necessary to say, in conclusion, that we think the evidence sustains the validity of the sale of March 7th by the banks to the defendants the *Fisks* and *Mrs. Sage*, as found by the judge.

The Reedsburg bank has no interest in that portion of the judgment which we reverse, and hence the defendants constituting that bank should not be required to pay any of the costs of this appeal.

By the Court.—That portion of the judgment of the circuit court which adjudges that the sale of the collaterals to Briggs “was valid and rightfully made, and extinguished the right, title and interest of said plaintiff in and to the collaterals so

Warder and others vs. Baker, Garnishee, and others.

sold," is reversed, with costs, to be taxed only against the defendants the *First National Bank of Baraboo*, *Nathan and Reuben Fisk*, and *Mary E. Gale Sage*; and the cause will be remanded for further proceedings according to law.

WARDER and others vs. BAKER, Garnishee, and others.

November 29, 1881 — January 10, 1882.

GARNISHMENT. *Garnishee's prior admission as estoppel, and as evidence.*

The mere facts that, during the pendency of an action for a money judgment by plaintiffs against T., B., knowing that plaintiffs were making the inquiry with a view to determining whether they should garnishee him, admitted an indebtedness on his part to T., and that plaintiffs were thus induced to commence garnishment proceedings against him, do not estop him from afterwards denying the existence of such indebtedness; though such admission is evidence for the jury as to the fact of indebtedness.

APPEAL from the Circuit Court for *Dane County*.

The case is thus stated by Mr. Justice TAYLOR:

"The plaintiffs obtained judgment against the appellants *Taylor & Taylor*, and also against *Lewis Baker* as garnishee. *Baker* was summoned as garnishee before judgment was obtained in the action against the *Taylors*. The issue between the plaintiffs and the garnishee was tried by a jury. Among other things the learned circuit judge instructed the jury as follows: 'If you find that the witness Ellsworth informed defendant *Baker* that he was the agent of the plaintiffs in this action, and that he was making the inquiries testified to by him on their behalf with a view of commencing garnishee proceedings against said *Baker* if he should have any surplus in his hands due to *Taylor Bros.* after paying any indebtedness which they might owe said *Baker*, but that he would not

VOL. LIV—4

Warder and others vs. Baker, Garnishee, and others.

commence garnishee proceedings against said *Baker*, and would make no expense for the plaintiffs, if no surplus would remain in said *Baker's* hands after so paying any indebtedness to said *Baker*; and if you further find that said defendant *Baker* then stated to Mr. Ellsworth that there would remain in his hands, when both policies should be paid, about the amount of one of said policies, or words to that effect; and that Mr. Ellsworth acted on said statement, believing it to be true, and instituted his garnishee proceedings relying upon them, and that *Mr. Baker* made said statement intending it to be acted upon,—then I instruct you that said defendant *Baker* is estopped as to the plaintiffs in this action from denying that he held said sum of about \$1,000 in trust for said *Taylor's*, and the plaintiffs are entitled to a verdict for the amount of the indebtedness due them on the judgment against the defendant *Taylor*.' ”

The plaintiffs had a verdict and judgment, and the garnishee appealed.

To the appellant there was a brief by *Smith, Rogers & Frank*, and oral argument by *Mr. Rogers*:

The court erred in assuming that there was any evidence in the case that warranted the application of the law of estoppel. Conceding that at and prior to the commencement of the action such statements were made by the appellant to the respondent's agent as would estop the appellant from attempting on the trial to show the truth, that estoppel ceased when, within a few days thereafter, the appellant notified the respondent by his sworn statement in writing that he was neither indebted to nor had in his hands any property of the defendants, unless the respondents, upon the trial, showed affirmatively that at the time of making the statements the defendants had other property of sufficient value to secure the debt, which might and would have been attached by the respondents were it not for their relying upon the truth of the appellant's statements, and that such property had since passed beyond the

Warder and others vs. Baker, Garnishee, and others.

reach of process. *Dewey v. Field*, 4 Met., 381; *Kinnear v. Mackey*, 85 Ill., 96; *Ford v. Smith*, 27 Wis., 261; *Warder v. Baldwin*, 51 id., 450. The sole injury complained of by respondents was their liability to pay costs. But to apply the doctrine of estoppel so as to charge the garnishee with the payment of a large sum of money he does not owe, in order to save the respondents a few dollars of costs, would be to make it a means of working, not preventing, a serious injury—to make it a sword instead of a shield. *Phillipsburg Bank v. Fulmer*, 2 Vroom, 52; *Exchange Bank v. Cooper*, 40 Mo., 170; *Jackson v. Pizley*, 9 Cush., 490. There was no evidence which tended to show that the appellant acquired any advantage by reason of the alleged statements, or that the respondents suffered any damage, parted with any right, or changed their position in consequence of their relying upon the truth of the same. *Barnard v. Campbell*, 55 N. Y., 463; *Brown v. Bowen*, 30 id., 541; *Winegar v. Fowler*, 82 id., 315; *Lewis v. Prenatt*, 24 Ind., 98; *Goodale v. Scannell*, 8 Cal., 27. The court should have charged the jury that if the element of fraud was lacking there could be no estoppel. *Brent v. Virginia Coal & Iron Co.*, 93 U. S., 326; *Dorlarque v. Cress*, 71 Ill., 380; *Morton's Adm'r v. Hodgdon*, 32 Me., 127; *Gove v. White*, 20 Wis., 425; *Thrall v. Lathrop*, 30 Vt., 307. The court should not have submitted the case to the jury on the question of estoppel, unless the proof in that regard was full and satisfactory. *Morris v. Moore*, 11 Humph., 433.

For the respondents there was a brief by *Lewis, Lewis & Hale* and *C. F. Harding*, and oral argument by *H. M. Lewis*. They contended, *inter alia*, that the appellant was clearly estopped by his conduct. *Bigelow on Estoppel*, 474; 12 Cent. L. J., 29; *Pickard v. Sears*, 6 Ad. & El., 469; *Stein v. Hermann*, 23 Wis., 132; *St. Louis v. Regenfuss*, 28 id., 144; *Gage v. Chesebro*, 49 id., 481; *Pierce v. Andrews*, 6 Cush., 4; *Stephens v. Baird*, 9 Cow., 274; 11 Cent. L. J., 431; *Roach v. Brannon*, 57 Miss., 490; *Cocke v. Kuykendall*, 41 id., 65;

Warder and others vs. Baker, Garnishee, and others.

Morgan v. Nunes, 54 id., 308; *Perry v. Williams*, 39 Wis., 339; *Blair v. Wait*, 69 N. Y., 113; *Chapman v. O'Brien*, 2 Jones & Sp., 524; 1 Greenl. Ev., secs. 267-8; *Cont. Nat. Bank v. Nat. Bank of Comm.*, 50 N. Y., 575; *Horn v. Cole*, 51 N. H., 287; *Kinnear v. Mackey*, 85 Ill., 96. The court will not inquire into the amount of damages that would be caused. It will only ascertain that there would be legal damage or injury. Bigelow on Estop., 575. An estoppel created by representations acted upon is commensurate with the thing represented, and operates to put the party entitled to the benefit of the estoppel in the same position as if the thing represented were true. *Marr v. Howland*, 20 Wis., 282; *Grissler v. Powers*, 81 N. Y., 57; *Fall River Nat. Bank v. Buffinton*, 97 Mass., 498. Fraud is not an essential element in an estoppel. *Blair v. Wait*, 69 N. Y., 113; *Manuf. & Traders' Bank v. Hazard*, 30 id., 226; *Preston v. Mann*, 25 Conn., 118; *Gove v. White*, 23 Wis., 282; *Bird v. Kleiner*, 41 id., 134.

TAYLOR, J. The instruction above recited was duly excepted to, and is alleged as error, and relied upon by the learned counsel for the appellants as a ground for reversing the judgment. Many other errors are assigned by the counsel for the appellants; but, as we have concluded that the judgment must be reversed on account of the error in this instruction, we do not think it necessary to pass upon the other assignments of error. We think the instruction given by the learned circuit judge, above quoted, that the facts therein stated, if found in favor of the plaintiffs, would estop the garnishee from denying his indebtedness to the principal defendants, and entitle the plaintiffs to a judgment against him for the amount of the judgment against the principal defendants, cannot be sustained by authority or any well-settled principles of law. If it can be supported as good law, then we can see no good reason why any defendant in an action, who has, before suit

Warder and others vs. Baker, Garnishee, and others.

brought, fully and fairly admitted to the plaintiff that he was indebted to him in any certain amount, should not, upon the trial of the action subsequently brought, be estopped from showing that his admission was false, or made under a mistake of the facts; and yet it is every-day practice to permit defendants not only to contradict their admissions made before trial, but to go further and contradict their most solemn promises in writing by showing that there was in fact no consideration for such promise.

The only ground for holding the garnishee estopped is that in reliance upon his admissions the plaintiffs commenced garnishee proceedings against him. There is no proof in the case that the plaintiffs in the garnishee proceedings have suffered any injury by reason of the statements or admissions made by the garnishee; that they have lost any remedy which they might otherwise have taken against the principal defendants, or been in any way prejudiced otherwise than the cost they have been put to in serving the garnishee process in the case. The evidence further shows that the garnishee papers had been all prepared in blank, ready for service, before the statements were made by the appellant which are relied upon as an estoppel, and that they were sworn to and served immediately after the statements were made; and that at the time the garnishee proceedings were served the plaintiffs had not obtained judgment against the original defendants, and did not obtain such judgment until some months after the garnishee had answered and denied all liability as garnishee. The proceedings were commenced against the garnishee April 24, 1880, and judgment was rendered against the original defendants November 19, 1880.

The record presents this question, and, as we think, no other: Is a garnishee estopped from denying his indebtedness to the principal defendants in the action because he has admitted such indebtedness, previous to the commencement of the action against him, to the plaintiffs, their agent or attorney, having

Warder and others vs. Baker, Garnishee, and others.

reason to believe at the time of making such admission that the plaintiffs would act upon them and commence proceedings against him as garnishee, when it does not appear that the plaintiffs have suffered any injury in any way by their reliance upon such admission, other than the mere expense of serving the papers in the action? After a careful consideration of the subject, and of the authorities cited by the learned counsel for the respondents to sustain the proposition, we are constrained to answer the question in the negative.

If an estoppel is created upon the facts of this case, then we see no reason why the estoppel would not arise upon like admissions made by a defendant in any other action; and in any action to recover a sum of money claimed to be due from the defendant to the plaintiff, an admission of indebtedness, made by the defendant before suit brought, would be equally conclusive of the right of the plaintiff to recover, especially where there was any dispute or uncertainty as to the fact of the indebtedness for which the action was brought, as it might well be presumed, in such case, that the plaintiff brought the action relying upon the admissions made by the defendant. If such were the rule, then the plaintiff ought to be permitted to plead in the first instance, not that the defendant owed him any debt, but that, previous to the commencement of the action, he admitted his indebtedness, and, relying upon such admission, he brought his action to recover the same. We have not been able to find any precedent for such a complaint. Yet we are forced to admit that the learned counsel has cited us to some decisions, and we have found one not cited, which seem to give countenance to that doctrine. *Meister v. Birney*, 24 Mich., 435-440; *Finnegan v. Carraher*, 47 N. Y., 493-499; *Hall v. White*, 3 C. & P., 136. But, when examined, we think they fall far short of sustaining the views of the learned counsel for the respondent.

Meister v. Birney was an action to recover rent. The evidence showed that the lessee had turned over the leased

Warder and others vs. Baker, Garnishee, and others.

premises to the defendant for one month, for which the rent had been paid. The landlord had agreed to make certain alterations, but he declined to make the same unless he had some further assurance that the future rents would be paid. The defendant, before the first month was out, told the plaintiff the lease had been assigned to him and he would pay the rent. The plaintiff thereupon completed the repairs, and the defendant stipulated in writing to the effect that the lessee had assigned the lease to him and he agreed to comply with its terms. Soon after the second month of the lease commenced, the defendant surrendered the possession to the original tenant, without giving any notice to the landlord, who commenced his suit for the rent of the second month. Justice COOLEY, in delivering the opinion, held in effect that the promise on the part of the defendant to pay the future rent was void, because he had no assignment of the lease except for the month the rent for which had been paid. He was not in possession of the premises during the second month, and making the repairs by the plaintiff was no consideration for the defendant's promise, because by the terms of the lease he was bound to make them. But the learned judge held the defendant liable, because, he says, the plaintiff had the right to rely upon his statement that he had purchased the lease and would pay the rent, and was not afterwards informed by the defendant, before suit brought, that he had surrendered the possession to the original tenant. The learned judge uses the following language: "Although he surrendered the possession to Rosa Meister after his month was up, he did not inform the plaintiff of that fact, *and we are not apprised by this record* that plaintiff was notified of the surrender before this suit was brought. The construction we put upon the judge's finding is, that the plaintiff, when he brought this suit, believed and relied upon the defendant's averment that he owned the term, and supposed him in possession, and to be in default in the payment of rent which it belonged to him to pay. If such

Warder and others vs. Baker, Garnishee, and others.

was the fact — if the plaintiff was induced to incur the expense of this litigation in reliance upon a promise to pay which was apparently legal and valid, and upon a statement of the defendant establishing such liability, which, though not true, he had reason to believe to be so, and to rely upon,— we think the defendant cannot be permitted in this suit to deny the truth of such statement, and thereby not only evade his promise, but impose upon the plaintiff the expenses of the suit. *Expenditures in litigation may as reasonably constitute the basis of an estoppel as any other expenditures*, and in this case it is just and equitable that they be held to do so.”

No authorities are cited by the learned court to sustain the position taken, and it appears that the plaintiff was permitted to recover upon a contract which the court held was absolutely void for want of any consideration, upon the sole ground that the defendant had stated that facts existed which, if true, would have been a good consideration for the promise to pay the rent, and which would in fact have made him liable for the rent without any express promise to pay, viz., that the lessee had turned over the leased property to him and that he was in possession thereof. It appears that in this case, while the defendant was in possession of the leased property by assignment of the first month of the term by the lessee, the defendant signed the following written memorandum at the foot of the original lease: “Rosa Meister having assigned her interest in the above agreement to B. L. Meister, the undersigned, he agrees to comply with the terms and conditions above specified. *June 1, 1880.* B. L. MEISTER.” And it further appears that this writing was signed, at the request of the plaintiff, after the defendant had notified him that the lease had been assigned to him, and that he was in possession under the lease. It seems to me that the liability of the defendant upon this contract, although a contract to pay the debt of another, was valid without the aid of the law of estoppel. The contract is in writing, and it expressed a consideration on its

Warder and others vs. Baker, Garnishee, and others.

face; and, although it should be admitted that such expressed consideration might be disproved for the purpose of showing the contract void under the statute of frauds, which I think a most doubtful proposition (*Sears v. Low*, 19 Wis., 96; *Cheaney v. Cook*, 7 Wis., 413; *Day v. Elmore*, 4 Wis., 190), still the facts proved did not show that the consideration expressed in the contract did not in fact exist. There was an assignment, at least, of a part of the term, and the defendant was in possession at the time of making the promise under such assignment. We agree with the learned court that it was "just and equitable that the defendant should be held to pay the rent," and we see no reason why he was not legally bound by his contract without the aid of the law of estoppel.

The case of *Finnegan v. Carraher* was an action of ejectment, and the question was whether the defendant, who claimed to be the owner of the premises in dispute, and whose tenant was in the actual possession of the premises when the action was commenced, should be permitted to defeat the action by showing the actual possession in his tenant and not in himself, he having stated that he was in the possession before and at the time the action was commenced; and the court held he should be estopped to show that fact, mainly, I think, upon the ground that the defendant was in fact the real party in interest, his title being in fact the matter in litigation, and the presence of the tenant, the actual occupant, was a mere formal matter so far as the action would settle the rights of the real owners. The court in that case says: "Estoppels are allowed for the prevention of fraud, and that which will enable a party to keep the lawful owner of property out of possession for a series of years, and put him to great expense by a technical mistake as to the person to be pursued, when the substantial party has been reached, is a fraud sufficient to support an estoppel." In this case there was no question as to the right of a plaintiff to maintain a substantial cause of action upon an admission of the defendant. The cause of action was litigated

Warder and others vs. Baker, Garnishee, and others.

between the real parties in interest, and the right of the plaintiff was not permitted to be defeated because the statute had provided that the tenant in possession should have also been made a party, such tenant having been omitted upon the statement of the defendant that he was himself in the possession.

In the case of *Hall v. White*, 3 C. & P., 136, on the trial of an action of *detinue* to recover certain documents relating to the estate represented by the plaintiff, it is stated that BEST, C. J., made the following remarks: "If the defendant said that he had the deeds, and thereby induced the plaintiffs to bring their action against him, I shall hold that they may recover against him, although the assertion was a fraud on his part. It appears by his letter that he did so say, and therefore I am of opinion that the verdict must be for the plaintiffs." His lordship then left it to the jury to give such damages as would compel the defendant to deliver up the deeds, and they accordingly found a verdict for £450.

The above is all that is reported in the case as said by the learned chief justice; but from the statement of the case it would appear that there was no evidence offered on the part of the defendant, and that it was upon the motion of the defendant to nonsuit the plaintiff for want of sufficient evidence showing the detention of the papers by the defendant, that the above remarks were made. It can hardly be supposed the learned justice intended, by what was said in that case, that he would not hear any evidence on the part of the defendant as to the real facts of the case, as no such proofs appear to have been offered by the defendant. What was said must be considered as relating to the sufficiency of the plaintiff's evidence to entitle her to recover, remaining wholly uncontradicted, and not as constituting an estoppel against him, which would prevent his showing a defense to the action. The evidence reported on the part of the plaintiff does not show any possession of the documents by the defendant except by way of inference,

Warder and others vs. Baker, Garnishee, and others.

and it is probable the motion for a nonsuit or verdict for the defendants was submitted for that reason; but the court thought the evidence of the admissions of the defendant were sufficient to charge him with having the possession and control of the same, and so directed a verdict against him.

In the case of *Trustees, etc., v. Williams*, 9 Wend., 147, the defendant was held estopped from defeating an action of ejectment for non-payment of rent by showing that there was sufficient property on the premises, subject to distress, to pay the rent at the time the action was commenced, because at that time he stated to the plaintiff there was no property on the premises, subject to seizure, out of which the rent could be collected. In that case the plaintiff was, by law, compellable to collect his rent out of the property subject to seizure therefor, if there was any, and ejectment would lie only when there was no property subject to such seizure. It was held that the defendant, having declared there was no such property, could not afterwards complain that ejectment was brought. No injury was done to the defendant by taking such course on the part of the plaintiff, as the statute gave the defendant six months, after the plaintiff had taken possession under his recovery in ejectment, to pay the rent; and upon such payment he would be restored to all his rights under his lease, the same as if no recovery had been had. No wrong was done to the defendant by refusing to permit him to change his ground, and insist that the landlord should have proceeded to collect his rent by distress, instead of by ejectment, after he had turned him over to that action.

The cases cited by the learned counsel from Mississippi (*Cooke v. Kuykendall*, 41 Miss., 65; *Morgan v. Nunes*, 54 Miss., 308; and *Roach v. Brannon*, 57 Miss., 490) are all cases where the question to be tried was, whether the plaintiff had wrongfully sued out an attachment against the defendant's property. The question was, whether the plaintiff was justified in pursuing a certain form of action to recover his debt of

Warder and others vs. Baker, Garnishee, and others.

the defendant. Whether he had the right to prosecute the action by attachment depended upon the question whether the plaintiff had reasonable grounds for believing the existence of certain facts; and it was held in all the cases that if, from the statements made by the defendant himself before the commencement of the action, the plaintiff, upon the supposition that such statements were true, would have good cause for suing out the attachment, the defendant would be estopped from showing the falsity of such statements to defeat the attachment. The question was not whether the facts set out in the affidavit upon which the attachment was founded did in fact exist, but whether the plaintiff had wrongfully issued the attachment. This was the view taken of the question in the two cases first cited, and, notwithstanding the contrary view expressed by the learned judge who wrote the opinion in the last case, we are inclined to think it was the true question upon the traverse made under the code of that state.

It will be seen that none of the cases above cited, and relied upon by the learned counsel for the respondents, were cases in which it was held that a cause of action in favor of the plaintiff could be created by way of estoppel against a defendant upon his mere admission before trial that such cause of action existed in favor of the plaintiff, unless it be the case cited from the Michigan court, and the *nisi prius* case cited from the English court, which we have commented on above. All the other cases cited by the respondents' counsel in his brief were cases where the party in whose favor the estoppel was sustained, had acted upon the admissions or statements made to the defendant by way of the purchase of property made upon the faith of such statements or admissions. None of them go upon the mere fact that the plaintiff had commenced an action relying upon the truth of such statements.

We have been unable to find any well-considered case which has held that an admission of liability made by a defendant before action brought, even though the action be brought by

Warder and others vs. Baker, Garnishee, and others.

the plaintiff in reliance upon such admission, estops the defendant from contesting such liability upon the trial, where the plaintiff shows no injury to himself as the result of such admission except that he was induced to bring the action. On the other hand, we find many cases which hold substantially the contrary. *Pierce v. Andrews*, 6 Cush., 4; *Jackson v. Pixley*, 9 Cush., 490; *Phillipsburg Bank v. Fulmer*, 2 Vroom, 52; *Johns v. Church*, 12 Pick., 557; *Campbell v. Nichols*, 4 Vroom, 81; *Exchange Bank v. Cooper*, 40 Mo., 169-172; *Kinnear v. Mackey*, 85 Ill., 96-98; *Lewis v. Prenatt*, 24 Ind., 98; *Ford v. Smith*, 27 Wis., 261-276; *Warder v. Baldwin*, 51 Wis., 450, 457-8; *Perry v. Williams*, 39 Wis., 339-343; *Goodale v. Scannell*, 8 Cal., 27; *Winegar v. Fowler*, 82 N. Y., 315-318; *Bursley v. Hamilton*, 15 Pick., 40-43.

The cases of *Bank v. Fulmer* and *Lewis v. Prenatt*, *supra*, were both cases against garnishees, and in both cases it was sought, as in the case at bar, to estop the defendants from showing that they were not indebted to the principal defendants, because they had, previous to the commencement of the action against them, admitted their indebtedness to such defendants. The same arguments were used by the plaintiffs in such actions as are used in this case, but in both cases the courts decided against the estoppel. These cases were decided upon the ground that a mere admission of liability, upon the strength of which the plaintiff commenced an action and suffered no other damage than what was incident to the commencement of the action, did not estop the defendant from showing upon the trial that no liability in fact existed upon which the plaintiff was entitled to recover. In the case of *Bank v. Fulmer*, the learned court say: "Salutary as is the doctrine of estoppel *in pais* as a preventive of fraud, when confined within reasonable limits, no case has ever gone so far as to render a man liable to pay a debt of \$2,000 which he did not owe, because, in consequence of his false statements that he did owe it, a suit was commenced against him, a failure to sustain which would throw the costs on the plaintiff."

Warder and others vs. Baker, Garnishee, and others.

We fully agree with the learned court in this proposition, and we think no well-considered case can be found which has held that an admission of liability, however solemnly made, unless made under seal, will create a cause of action in favor of any person who has suffered no other injury in reliance upon such admission than commencing an action against the party making the same. In all such cases the admission is no more than evidence tending to prove the liability; is always subject to be overcome by other proofs, and never amounts to an estoppel; and in this and most of the other states, even where the admission is under seal, it does not estop the defendant. See section 4195, R. S. If an admission of liability is an estoppel against the person making it in favor of the person to whom it is made, and prevents the party making the admission from denying its truth, if an action be brought to enforce the liability admitted, it would overturn the venerable rule that the defendant may show a want of consideration to defeat an action upon his written contract expressing and admitting a consideration for the promise; as in the action upon a promissory note or other obligation for the payment of money.

The rules of law governing the action upon promissory notes very clearly illustrate the effect which mere admissions have upon the rights of the defendant in the action. In such actions, when the suit is between the original parties, or persons standing in like situation, the admissions made in the contract are only *prima facie* evidence of liability, even though made under seal, and the fact that the plaintiff has brought his action relying on such admission does not in any way estop the defendant from showing the truth; but when a third party brings the action, and shows that he acquired the title to the contract under such circumstances, as the law says he may do, in reliance upon the defendant's admission of liability in the contract itself, or if he acquires it under such circumstances that the law does not give him the right to rely upon the mere written promise and admission of liability, still he may estop the defendant from denying such liability, if, before he

Warder and others vs. Baker, Garnishee, and others.

purchases, he makes inquiry of the defendant, who admits the liability, and on the strength of such admission he pays his money for the purchase thereof. The defendant in such case is estopped to deny his liability, because the plaintiff makes the purchase relying upon his admission, and not because he has brought suit relying upon such admission. No case can, I think, be found where an action has been maintained by the holder of a promissory note, or other negotiable instrument, who purchased after the note or other instrument was past due, upon an admission of liability made by the maker to the holder after the purchase had been made, simply on the ground that he brought his action relying upon such admission.

In the case of *Ford v. Smith*, 27 Wis., 267, Chief Justice Dixon, delivering the opinion of the court, said: "The proposition that there could be an estoppel growing out of a mere levy made in consequence of such statements, although authorized, when the sheriff was informed of the truth and notified not to proceed before sale, is untenable. The sheriff does not, by the levy alone, acquire the position or the rights of a purchaser for value without notice." In the case of *Warder v. Baldwin*, 51 Wis., 457, the court in its opinion used the following language: "In order to create an estoppel in favor of an officer seizing property upon a writ against the real owner thereof, such owner or his authorized agents must have done or omitted to do something which induced the officer to act differently from what he would have otherwise done, and it must also further appear that the assertion of the real title will jeopardize the rights of the person in whose favor the writ is issued, contrary to equity."

"If a seizure of the wrong property upon a writ of replevin were induced by the real owner, that might be a good defense to an action for the mere seizure; but if the owner afterwards notified the sheriff of his title, and demanded the return of the property, the sheriff would be a wrong-doer for not returning it, unless he could show that it would be prejudicial

Warder and others vs. Baker, Garnishee, and others.

to the rights and interests of the person in whose favor such property was seized, to permit such return."

In *Perry v. Williams*, 39 Wis., 343, this court said: "It is conceded on all hands that a receiptor who conceals from the officer his ownership of the property and suffers it to be attached as the defendant's, thereby preventing the officer, perhaps, from attaching other property, is precluded, when sued upon the receipt, from setting up property in himself."

These cases clearly hold that the fact that the officer or party made the attachment or seizure relying upon the declarations or conduct of the real owner, did not estop such owner from asserting his title, unless the party represented by the officer had lost some other means of securing his debt or property by reason of his reliance upon such declarations or conduct by the real owner. In the case at bar there is no pretense made in the evidence that the respondents lost anything by their reliance upon the admissions of the garnishee. There is no pretense that the principal defendants had any other property which might have been seized or garnished by the plaintiffs to secure the payment of their debt, and that, relying upon the admissions of the garnishee, they neglected to attach such other property or garnish other indebtedness to the principal defendants. They simply served the garnishee papers on the garnishee, and within twenty days thereafter he filed an answer under oath denying all liability or indebtedness to the principal defendants. By this act he withdrew his admissions made to the plaintiffs' agents, if any were made, and under oath denied their truth. This denial was made several months before the respondents obtained judgment against the principal defendants, and, consequently, many months before they could try the question of the liability of the garnishee. After such denial, it was their own fault if they failed to take any other steps to secure their debt due from the principal defendants. After the admission was withdrawn by the garnishee, they had no right to neglect to take other proper steps to secure their

Warder and others vs. Baker, Garnishee, and others.

claim, and charge such neglect to the action of the appellant. If, at the time the appellant withdrew his admission of liability to the respondents upon the garnishee proceeding, they had not lost any other remedy against the principal defendants, there was nothing upon which they could claim an estoppel as against the appellant. A false statement made by one party to another, which works no *injury* to *such other*, has never been held to constitute a cause of action. Where it does work an injury, the right of recovery is limited by the extent of the injury inflicted. And this, in my opinion, is the rule applicable to the case of estoppels, especially where the title to specific property is not affected by such estoppel.

In the case at bar, the only injury which the respondent suffered, so far as the proofs show, by reason of the alleged false statement of the appellant, before the same was withdrawn, was the service of the garnishee papers upon him. It is hardly in accord with equity to charge the appellant with the payment of \$800 and over, because the respondents, in reliance upon his admissions, were damaged to an extent not amounting to as many cents. The potency of the admissions, if proved to the satisfaction of the jury, as proof of the indebtedness of the garnishee to the principal defendants, notwithstanding his denial of such indebtedness under oath upon the trial, was a question for the jury; but they do not amount to such proof of the indebtedness, when such indebtedness is denied under oath, as would authorize the court to determine as a matter of law that such indebtedness did in fact exist; and, as we have stated above, such admissions not working an estoppel upon the garnishee, the instruction excepted to was clearly erroneous.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

VOL. LIV—5

Putney vs. Cutler and another.

PUTNEY vs. CUTLER and another.

December 13, 1881 — January 10, 1882.

Tax Deed: Record of seal.

Where a tax deed as recorded purports to have been executed by the county clerk in behalf of the state and county, and duly witnessed and acknowledged, and recites that the clerk has subscribed his name officially and affixed the seal of the county board, it is admissible in evidence of title, although the only representation of a seal therein is a scroll near the clerk's name, with the word "seal" written within it.

APPEAL from the Circuit Court for *Waukesha* County.

Ejectment, for a village lot. The plaintiff claims title by deeds from the defendant *Cutler*. The defendants, by joint answer, admit that the plaintiff has title to an equal undivided half of the lot by deed dated June 28, 1871, and is in possession of the east half of the lot, and insist that the defendant *Eckert* has title to the other undivided one-half of the lot by deed from *Cutler* dated November 29, 1878, and that the plaintiff and defendants agreed that the plaintiff should take and have possession of the east half and *Eckert* the west half of the lot, and they each thereupon went into the occupancy of the respective halves of the lot as so divided. The answer also contains a general denial, except as to the facts admitted. The evidence tended to show that *Cutler* once owned the whole lot; that he conveyed an undivided one-half to one Kelsey in 1848, and the other undivided one-half to the plaintiff in 1871, and that Kelsey conveyed to the plaintiff, May 22, 1878. The court admitted in evidence a quitclaim deed of the undivided one-half of the lot from Giles C. Dana and wife to *Cutler*, dated July 12, 1871, and recorded the same day; also a quitclaim deed of the same from *Cutler* to *Eckert*, dated November 29, 1878; also a contract for the sale of the same from *Cutler* to *Eckert*, dated March 8, 1876; but excluded the evidence of the records in the office of the register

Putney vs. Cutler and another.

of deeds of Waukesha county of each of the following deeds, to wit: (1) Tax deed from Waukesha county to Giles C. Dana, dated January 26, 1865, and recorded the same day. (2) Tax deed from the village of Waukesha to Giles C. Dana, dated March 1, 1867, and recorded July 13, 1871. (3) Tax deed from Waukesha county to *Cutler*, dated May 14, 1878, and recorded the same day. (4) Tax deed from Waukesha county to *Cutler*, dated August 26, 1878, and recorded the same day. The court directed a verdict for the plaintiff; and from the judgment entered thereon the defendants appealed.

For the appellants there was a brief by *J. V. V. Platto* and *W. S. Hawkins*, and oral argument by *Mr. Platto*:

1. It was not necessary to the validity of the record that the device and inscription on the official seal should be transcribed, but such seal was sufficiently recorded by the use of the word "seal," written in a scroll. *Huey v. Van Wie*, 23 Wis., 613, 618. 2. The deeds having been issued in the form prescribed by law, and a seal appearing, the presumption is that the seal was official and regular. 1 Greenl. on Ev., § 38a; 5 U. S. Dig., §§ 779-81, 800; *Hartwell v. Root*, 19 Johns., 347; *Mills v. Johnson*, 17 Wis., 604; *McKutchin v. Platt*, 22 id., 565; *Schnee v. Schnee*, 23 id., 382.

Warham Parks, for the respondent, contended that it was necessary to the validity of the original deeds that the corporate seal should be upon them (Tay. Stats., 439, § 167; Dillon on M. C., §§ 131, 450, with the notes thereto, and cases there cited; 2 Washb. on R. P., 247 [*570]; *Woodman v. Clapp*, 21 Wis., 367; *Knox v. Huidekoper*, id., 527); that the reason why the statute makes the record of such a deed evidence is, that the law presumes the record to be a true and exact copy; and that this record shows upon its face that the originals had not the corporate seal, but a private seal. In *Huey v. Van Wie*, 23 Wis., 613, it was merely held that such a record was sufficient to set the statute running in favor of the deed.

Putney vs. Cutler and another.

CASSODAY, J. The record of each of the four tax deeds offered in evidence by the defendants was excluded, because such record did not show that the seal of the county was on the deed.

From the records offered it would appear that three of the deeds therein recorded were each executed by the clerk of the county board of supervisors of Waukesha county, for and in behalf of the state and county, in the presence of two witnesses, who subscribed the same as such, and the same was acknowledged before a proper officer, who certified to the fact, and that the clerk had thereunto subscribed his name officially and affixed the seal of the county board the day and year stated. From the record of the deed from the village it appears that the same was executed by the treasurer of the village, as such, for and in behalf of the village, and that he affixed thereto the seal of the village, similar to the county deeds. Such tax deeds, therefore, were thereby made presumptive evidence of the regularity of all the proceedings, from the valuation of the land by the assessor up to and including the execution of the deed, and were entitled to be recorded with the like effect as other conveyances of land, unless they were obnoxious to the objection raised. Sections 1176, 1178, R. S.; sections 25, 50, ch. 22, Laws of 1859. The precise objection to the record of each deed is, that it has nothing upon it representing the corporate seal, but only a scroll near the name with the word "seal" written in it, and that it must therefore be held that such scroll, with the word "seal" in it, is a true copy of all there was representing a seal on the original, and hence that such original, being nothing more than a scroll with the word "seal" written therein, must be taken as the private or individual seal of the clerk, and not the corporate seal of the county or the village. It is true the statute required that such deed should have affixed thereto the seal of such board, which was thereby declared to be the corporate seal of the county. Section 51, ch. 22, Laws of 1859; section

Putney vs. Cutler and another.

1176, R. S. Assuming that these tax deeds were properly executed, acknowledged and certified to, so as to become effectual, and that the same were properly recorded, then the statute by its terms made the record of each of such deeds receivable as *prima facie* evidence, without further proof thereof. Section 4156, R. S.; section 31, ch. 86, R. S. 1858. The statute nowhere requires the register to make "a *fac simile* of the original" impression of an official seal, as in case of recording a map. Section 2262, R. S. It fails to give any direction as to how the official seal or the impression of it is to be represented on the record. No one would be so impracticable as to claim that the impression of the seal itself should actually be made upon the record. If not all of it, then just how much shall be omitted and how much copied? Shall it be in the exact form and size of the original, or is it sufficient if it appears from the whole record that the corporate seal was affixed to the original deed? Shall we assume here that the county clerk, in violation of the duty imposed upon him by statute, neglected to affix the seal, especially when the body of the instrument expressly declares that he executed the paper officially, for and in behalf of the county, and affixed the seal of the county board thereto?

One of the purposes of a record is to give constructive notice; and, since it is apparent from the context of each of the records offered that the scroll, with the word "seal" written therein, was intended as a representation of the corporate seal, it would seem to answer the purposes of the recording act. In *Huey v. Van Wis*, 23 Wis., 613, this court has already held, in effect, that the record of a tax deed is sufficient to set the statute of limitations running, notwithstanding the only record of the official seal was, as here, a scroll at the end of the clerk's signature, with the word "seal" inside of it. We have no doubt of the correctness of that decision. Courts often indulge in presumptions in favor of the performance of official duty,

Putney vs. Cutler and another.

especially, as here, where the record recites that the duty was performed. *Scheiber v. Kaehler*, 49 Wis., 291; *Hartwell v. Root*, 19 Johns., 345; 1 Greenl. Ev., § 38a, and cases there cited. Certainly one of the objects of recording a deed is to give the public notice that the title to the property has passed from the vendor, and thereby prevent others dealing with him as the owner. The deed, of course, should be copied into the record, so that parties may determine its sufficiency and the nature of the estate conveyed. It should, moreover, appear from the record that the deed was under seal; and in case of a tax deed that the corporate seal had been affixed. This, we think, does appear from each of the records in question.

In *Griffin v. Sheffield*, 38 Miss., 359, it was held that "the statute of registration does not contemplate the recording of the impression of a public seal; and hence it is no objection to the admission in evidence of a certified copy of a recorded deed, that a copy of the impression of the official seal of the officer who took the acknowledgment of the grantor does not appear on it, if it be stated in the body of the certificate of acknowledgment that it was certified under such official seal."

In *Smith v. Dall*, 13 Cal., 510, it was held that "the omission, in the record of a deed, to make a copy of the seal, or some mark to indicate the seal, does not vitiate the record," but that it is "enough if it appear from the record that the instrument copied is under seal." To the same effect is *Jones v. Martin*, 16 Cal., 165. Whether we would be justified in going to the extent of these decisions, may be doubtful. It has certainly been held by other courts that "where the record of a deed does not show a copy of the seal as such copies are usually made in records, the presumption is that there was no seal in the original." In the case at bar the record does "show a copy of the seal as such copies are usually made in records," and hence it must be presumed that the corporate seal was upon each of the original deeds in question.

Waldo vs. Manitowoc County.

For the reasons stated, we think the tax deeds should have been admitted in evidence. The conclusions reached render it unnecessary to consider the other question discussed.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

WALDO vs. MANITOWOC COUNTY.

December 13, 1881 — January 10, 1882.

County Offices.

Where the county supervisors provide an office in the court house of the county for a county officer (in this case a county judge), if he takes and occupies an office elsewhere, he cannot recover from the county any moneys paid by him as rent therefor.

APPEAL from the Circuit Court for *Brown* County.

The plaintiff was county judge of Manitowoc county during the years 1870 to 1873, inclusive. He kept his office away from the court house during his whole term, and paid the rent thereof. In May, 1878, he presented to the board of supervisors a claim against the county for the amount of rent so paid by him. The board disallowed the claim. The plaintiff thereupon appealed to the circuit court. The cause was tried in that court without a jury, and resulted in a judgment dismissing the complaint, with costs. The plaintiff appealed to this court.

For the appellant there was a brief by *Henry Sibree*, his attorney, with *H. G. & W. J. Turner*, and oral argument by *W. J. Turner*.

For the respondent there was a brief by *W. A. Warder*, district attorney, with *C. E. Estabrook*, of counsel, and oral argument by *Mr. Estabrook*.

Hammel vs. Queen's Ins. Co. of London and Liverpool.

LYON, J. The judgment against the plaintiff went upon several grounds, but one of which will be noticed. The court found, among other things, "that there were, during the said years, rooms in the Manitowoc court house offered to said plaintiff for his said office by the county board of Manitowoc county, which rooms so offered the plaintiff declined to occupy." There is conflict in the testimony on the subject, but we think there is sufficient testimony to support the above finding of fact. This being so, the complaint was properly dismissed, and the judgment must be affirmed. When the board of supervisors provides an office in the court house of the county for a county officer, the duty of the county in that behalf is performed, and the officer can be compelled to occupy the office provided. If he take his office elsewhere, he does so in his own wrong; and, although the board do not resort to extreme measures to compel him to his duty, he cannot, by his wrongful act, fasten an additional burden on the county. This is too clear for discussion.

By the Court.— Judgment affirmed.

HAMMEL VS. QUEEN'S INSURANCE COMPANY OF LONDON AND LIVERPOOL.

December 13, 1881 — January 10, 1882.

INSURANCE AGAINST FIRE: Forfeiture clauses construed. (1) "*Levy of an execution*" inapplicable to realty. (2) "*Alienation*" or "*change in title or possession,*" inapplicable to execution sale of realty.

1. A provision in a fire-insurance policy that the "levy of an execution" on property insured shall terminate the risk, is applicable only to *personal* property, there being in practice no *levy* of an execution on real estate.
2. Such a policy provides for an immediate termination of the risk "if the property be sold or transferred, or any alienation or change take place in the title or possession, whether by legal process or judicial decree, or

Hammel vs. Queen's Ins. Co. of London and Liverpool.

voluntary transfer or conveyance." Under the laws of this state, the original owner of land, his heir or assignee, has full rights of possession, occupancy and use for fifteen months after the sale of the land on execution; for twelve months of that time he has an absolute right to redeem, and, on his failure to do so, other judgment creditors or mortgagees may redeem within the next three months; and the purchaser at execution sale can acquire, as such, neither title nor possession before the end of the fifteen months. *Held*, that an execution sale of realty is in itself no ground of forfeiture under the condition above recited.

APPEAL from the Circuit Court for *Outagamie* County.

Action upon a policy of insurance against fire. There was a special verdict, and cross motions for judgment thereon; and from a judgment in favor of the plaintiff the defendant appealed. The error assigned by the appellant will sufficiently appear from the opinion.

For the appellant there was a brief by *Finch & Barber*, and oral argument by *Mr. Barber*. To the point that there was such an *alienation* of the property by the execution sale as worked a forfeiture of the policy under its expressed conditions, they cited Wood on Ins., § 325; *Tomlinson v. Ins. Co.*, 47 Me., 232; *Abbot v. Ins. Co.*, 30 id., 414; *Edmands v. Ins. Co.*, 1 Allen, 311; *Young v. Eagle Ins. Co.*, 14 Gray, 152; *Savage v. Howard Ins. Co.*, 52 N. Y., 502; *Perry v. Ins. Co.*, 61 id., 214; *Appleton Iron Co. v. Ins. Co.*, 46 Wis., 23.

For the respondent there was a brief by *Barnes & Goodland* and *Leopold Hammel*, and oral argument by *Mr. Barnes*.

TAYLOR, J. This is an action to recover upon an insurance policy against loss by fire. The respondent recovered in the court below, and the company appealed from the judgment. The only error assigned by the learned counsel for the appellant is, that it was shown upon the trial that after the policy was issued and before the loss, and without the knowledge of the company or its authorized agents, the real estate insured was sold upon an execution issued upon a judgment rendered

Hammel vs. Queen's Ins. Co. of London and Liverpool.

against the plaintiff. The sale upon the execution took place on the 26th day of July, 1879, and the loss occurred on the 11th day of November, 1879. The judgment upon which the execution was issued and sale made, was rendered and duly docketed on the 5th of June, 1878. The policy upon which this action is brought was issued on the 17th of May, 1879, and insured the property therein described for one year from the date of its issue.

It is claimed by the learned counsel for the appellant, that the sale of the real estate made by virtue of the execution issued upon said judgment rendered the policy void from the date of such sale, under the following condition in said policy: "This policy shall be void and immediately cease to be binding on the company, if the property be sold or transferred, or any alienation or change takes place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance." Appended to the paragraph of conditions in which the condition above quoted is contained, there is this note: "The commencement of proceedings to foreclose a mortgage, or levy of execution, shall be deemed an alienation of the property, and the company shall not be holden for loss or damage thereafter."

The jury found that the agents of the company had knowledge of the litigation which resulted in the judgment and sale above mentioned, before the policy was issued. They also found that they had no knowledge of the fact that judgment had been obtained, or that an execution had been issued thereunder and a sale made, before the loss occurred.

The question to be determined is, whether a sale of real estate upon execution, which had not yet become perfected by deed, and on which sale the time for redemption by the judgment debtor had not yet expired when the loss occurred, was a breach of the condition above quoted. It is not contended by the learned counsel for the appellant that this case comes within the provisions of the note appended to the paragraph

Hammel vs. Queen's Ins. Co. of London and Liverpool.

as above stated, which makes "the levy of an execution" avoid the policy. This court, in the case of *Shafer v. Phœnix Ins. Co.*, 53 Wis., 361, following the decision in *Colt v. Ins. Co.*, 54 N. Y., 595, and other cases, held that the words "levy of an execution," in a policy of insurance, meant a levy upon personal property, for the reason that in practice there is no such thing as a levy of an execution upon real estate. All that is necessary to make a regular sale of real estate upon execution issued upon a judgment is to publish the notice of sale as required by the statute, and make the sale at the time mentioned in such published notice. No entry of a levy upon the execution is necessary to perfect such sale.

Whether a sale of real estate upon execution is a violation of the condition of the policy above quoted, depends very much upon the nature and effect of such sale under the laws of this state. Under our laws the sale of real estate upon execution does not give the purchaser any right to the possession of the property sold until fifteen months after such sale takes place. During that time the original owner has the same right of possession, occupancy and use of the premises sold that he had before the sale, and during the twelve months next after the sale he has the absolute right to avoid the effect of the sale by paying the sum bid upon such sale, with interest at the rate of ten per cent. If the original owner die during the twelve months, the title descends to his heirs-at-law as though he were the absolute owner, and such heirs succeed to his right to redeem. So, if he convey the lands during such time, his grantee becomes vested with the title, and may redeem from the sale. The right of the purchaser is conditional, not only upon the right of the owner to redeem within twelve months after the sale, but also upon the further condition that other judgment creditors and mortgagees may redeem at any time within three months after the expiration of the twelve months within which the owner has such right. At the end of the fifteen months the purchaser may, if no

Hammel vs. Queen's Ins. Co. of London and Liverpool.

redemption has been made, perfect the sale by demanding a conveyance from the officer who made it, or his successor in office; and when so clothed with the title, and not before, he may demand possession of the premises.

The purchaser has neither the title, possession nor right of possession until the time of redemption expires, and can maintain no action for any injury to the premises or the possession unless such injury amounts to such waste as would entitle a remainder-man to maintain an action pending the life or other estate upon the termination of which the estate in remainder vests.

Is a sale which only authorizes the vendee to demand a conveyance of the title at a future date, which right to so demand the title is subject to be defeated at any time before that date by the owner, his heirs, assigns or judgment creditors, upon payment of the purchase money and interest, and which leaves the right of possession and use in the original owner until such fixed date arrives, such a sale, transfer, alienation or change in the title or possession as is contemplated by the condition in the policy above quoted?

Keeping in mind the rule which governs the construction of all contracts, where the main purpose of the contract is sought to be avoided by the breach of a condition subsequent, which by its terms cuts off all inquiry into the question of its materiality or whether the party seeking to avail himself of the breach has been injured thereby, we are clearly of the opinion that such sale was not a breach of the condition. The rule is well settled that in the construction of such conditions, if the terms are of doubtful meaning, or are susceptible of two constructions, that meaning will be given to them which is most favorable to the rights of the party seeking to uphold the contract, and most strongly against the party who seeks to avoid it, unless such latter construction be clearly against the intent of the parties, as shown by the whole contract. The words "sold," "transferred," "alienation," and "change of title,"

Hammel vs. Queen's Ins. Co. of London and Liverpool.

have been frequently defined by the courts in insurance and other cases, and we think the great weight of authority is against the construction sought to be put upon them by the learned counsel for the appellant.

In the case of *Jackson v. Silvernail*, 15 Johns., 278, where a lessee covenanted *not to sell, dispose of or assign his estate in the demised premises* without the permission of his lessor, and the sale contained a clause of forfeiture for the non-performance of the covenants, it was held that a lease of a part of the premises for twenty years was not a breach of the covenant and did not work a forfeiture, and that nothing but an assignment of his whole estate by the lessee would work a forfeiture. A like decision was made in *Jackson v. Harrison*, 17 Johns., 66. In *Jackson ex dem. Schuyler v. Corliss*, 7 Johns., 531, and *Jackson v. Kipp*, 3 Wend., 230, in case of a covenant that on every sale or assignment the reversioner should have the right to demand one-fifth of the consideration money, it was held that there was no breach of such covenant when the sale was made upon execution in a *bona fide* adverse proceeding.

In *Strong v. Ins. Co.*, 10 Pick., 40, it was held that a condition in the policy, which provided "*that if the property should be sold or conveyed in whole or in part, the policy should be void*," was not broken by a sale upon execution, and that the provision in the policy referred only to voluntary assignments. See also *Smith v. Putnam*, 3 Pick., 221; *Doe v. Carter*, 8 Term R., 57; *Stetson v. Ins. Co.*, 4 Mass., 330; *Franklin Ins. Co. v. Findley*, 6 Whart., 483; Wood on Ins., § 326; *Baley v. Ins. Co.*, 80 N. Y., 21; *Barlow v. Ins. Co.*, 63 N. Y., 399; *Commercial Ins. Co. v. Spankneble*, 52 Ill., 53; *Starkweather v. Ins. Co.*, 2 Abb. (U. S. C. C.), 67. These cases, and numerous others that might be cited, seem to settle the question that the condition prohibiting a sale, transfer or conveyance of the insured property is to be construed as limited to a voluntary transfer, and not to a sale or transfer made by adverse legal proceedings. In all these and similar cases

Hammel vs. Queen's Ins. Co. of London and Liverpool.

it is probable that if an adverse legal sale, transfer or conveyance of the insured property had been made previous to the loss, so as to divest the insured of all right, title or interest therein, no recovery could be had, for want of an insurable interest in the policy-holder at the time of the loss. As this case clearly shows that the sale upon execution did not divest the insured of all title or interest in the insured property, nor of the possession thereof, at the time of the loss, we might rest the affirmance of the judgment of the court below upon the ground that the conveyance, sale or alienation was not a voluntary one, and did not, therefore, come within the provisions of the condition, were it not for the words in the condition, "whether by legal process or judicial decree or voluntary transfer or conveyance;" but as it may be well urged that these words reach back to the beginning of the sentence, and give character to the words "sold or transferred," as well as to the words "alienation or change of title," we must determine the other question, whether the sale on execution, unperfected, was a sale, transfer, alienation, or change of title, within the meaning of the condition, admitting that the words refer to an involuntary as well as a voluntary sale, etc. We think all the decisions hold that these words mean such a change of the title of the insured property as divests the insured of the legal title, and gives the right of possession to some other person than the insured. They do not cover an executory contract for sale where the vendee does not by the contract become entitled to the possession, nor to an incumbrance of the estate by judgment, mechanic's lien, mortgage or otherwise, where such incumbrance is not created by some conveyance which gives the legal title to the incumbrancer. It will be found that in all the cases cited by the learned counsel for the appellant to sustain his position, there was an alienation or change of title shown. They were cases where there was, in fact, a transfer of the legal title before the loss.

In *Perry v. Lorillard Ins. Co.*, 61 N. Y., 214, the court

Hammel vs. Queen's Ins. Co. of London and Liverpool.

held that a condition similar in all respects to the one in this case was broken by an assignment in bankruptcy of the insured property before loss. The opinion is based upon the ground that the proceedings in bankruptcy transferred the legal title and possession from the insured to the assignee in bankruptcy, and although there might still remain in the insured an insurable interest, yet, there having been a transfer in law and in fact of the title and possession, the condition was broken.

In *Abbot v. Ins. Co.*, 30 Me., 414, it was held that a by-law of the company which prohibited the insured from *selling or alienating the property in whole or in part*, was broken by a sale of the property insured, although the insured upon such sale took back a mortgage for a part of the purchase money. Upon this sale the purchaser was let into possession, and he was in possession when the loss occurred.

In *Tomlinson v. Ins. Co.*, 47 Me., 232, where by the terms of the policy it was to be absolutely void "if the insured, *without the assent of the company, alienated the property in whole or in part*," it was held that the insured having mortgaged the insured property after the policy issued, and, after making such mortgage, having transferred his equity of redemption to another person, from whom he took back a bond of defeasance, which was not recorded as required by law in order to convert such second transfer into a mortgage, avoided the policy. It does not appear in this case whether the insured remained in possession at the time of the loss or not.

In *Springfield F. & M. Ins. Co. v. Massasoit Ins. Co.*, 43 N. Y., 389, it was held that an absolute sale and transfer by the mortgagor of the insured premises, before the loss, avoided the policy, though the loss was made payable to a mortgagee of the insured property. In *Savage v. Ins. Co.*, 52 N. Y., 502, the policy contained the following condition: "*If the property be sold or transferred, or any change takes place in title or possession, whether by legal process or judicial de-*

Hammel vs. Queen's Ins. Co. of London and Liverpool.

cree, or voluntary transfer or conveyance." It was held that the policy was avoided by a sale and conveyance of the property by the assured before loss, although the purchaser gave back to the insured a mortgage for the greater part of the purchase money. The grantee and mortgagor was in possession when the loss occurred.

In all these cases it will be seen that there was an alienation or conveyance of the property itself; the title of the insured was changed and transferred to another, either by his own act or by operation of some legal process, judgment or decree; and in all but one the possession was also changed.

In *Orrell v. Fire Ins. Co.*, 13 Gray, 431, the policy contained the following condition: "*In case of any sale, transfer, or change of title in the property insured by this company, such insurance shall be void.*" Upon the trial the court instructed the jury as follows upon the question of forfeiture: "That to constitute an alienation it must be such as to pass the legal title as between the parties to it; that it need not be such a sale as would be valid as against the creditors of the plaintiff; that a mere agreement of the parties to represent to creditors that there had been such sale, to protect the property from attachment, when, in fact, nothing had been done by way of formal transfer of the property, would not constitute such alienation as would defeat the policy." This instruction was upheld by the supreme court.

In *Conover v. Ins. Co.*, 3 Denio, 254, it was held that under the statute creating the corporation, which provided that *when the property insured by the corporation should be alienated by sale, or otherwise*, the policy should be void, the giving of a mortgage upon the property insured after it was issued, and before loss, did not avoid the policy; that a mortgage was not an "alienation, by sale or otherwise," within the meaning of the charter.

There is an almost uniform line of decisions upon conditions similar to the one in the policy under consideration, which

Hammel vs. Queen's Ins. Co. of London and Liverpool.

hold that nothing short of a change of the legal title to the property insured will be a breach of the condition; and this has always been so held where the insured remains in possession, and has the right of possession when the loss occurs. Some cases have held that an executory sale and possession taken by the vendee before loss would avoid the policy. Where a policy contained the condition that "when any property insured in the company shall in any way be *alienated*, or where the title of any property insured shall be changed by sale, mortgage or otherwise, the policy shall be void," it was held that giving a mortgage upon the insured property was not a breach of the condition. *Shepherd v. Ins. Co.*, 38 N. H., 232; *Folsom v. Ins. Co.*, 30 N. H., 231; *Rollins v. Ins. Co.*, 25 N. H., 206.

In the case of *Shepherd v. Ins. Co.*, the court, in commenting on the construction which should be put upon the terms "when the title shall be changed by sale, mortgage," etc., say: "The title may be changed by a mortgage and foreclosure, but it is not either a vulgar or technical expression to speak of a change of title by the mere execution of a mortgage. In equity, and even at law, a mortgage is not regarded as a title to land. It is considered a lien, or incumbrance, which may transfer the title to the mortgagee; but the mortgagor is regarded as the owner until entry of the mortgagee or foreclosure. We may so readily imagine a great variety of forms of expression which would make a policy void if the property should be mortgaged, that it may be fairly inferred from the use of the phrase, 'when the title shall be changed,' that it was not designed to include a mere mortgage." These comments are quite applicable to the condition under consideration. It is admitted that suffering a judgment to be obtained against the insured, which would be a lien upon the real estate insured, would not be within the terms of the condition, and it seems to us equally clear that the giving of a mortgage would not; otherwise there would be no sense in the condition contained

Hammel vs. Queen's Ins. Co. of London and Liverpool.

in the note, viz., that "the commencement of proceedings to foreclose a mortgage shall be deemed an alienation." If it were intended that the mere giving of a mortgage on the insured premises should be a violation of the condition, there was no necessity of adding, by way of explanation, that the commencement of an action to foreclose the same should be deemed an alienation. This explanation clearly shows that the giving of a mortgage was not prohibited by the previous condition. But there are abundance of decisions which hold that the giving of a mortgage is not a sale, transfer, alienation, change, or conveyance of the property insured. *Jackson v. Ins. Co.*, 23 Pick., 418; *Allen v. Franklin Ins. Co.*, 9 How. Pr., 501; *Pollard v. Ins. Co.*, 42 Me., 221; *Washington Ins. Co. v. Hayes*, 17 Ohio St., 432; *Tomlinson v. Ins. Co.*, 47 Me., 232. Wood, in his work on Insurance, § 325, cites the case of *Edes v. Ins. Co.*, 3 Allen, 362, as an authority holding that the giving of a mortgage was a breach of a condition in a policy which rendered the policy void "*when the property shall be alienated by sale or otherwise;*" but upon examination of the case we find the condition under which the court held the giving of a mortgage avoided the policy was as follows: "When any property insured shall be alienated or *incumbered by sale, mortgage, assignment or otherwise*, the policy shall thereupon be void."

Arguing from analogy, it would seem to follow that a sale of real estate upon execution, which has the limited effect given to it by our laws in the way of conveying title, would not amount to an alienation, conveyance, sale, or change of title, within the meaning of the condition in the policy in question. We are not, however, without authority upon this specific question.

In *Strong v. Ins. Co.*, 10 Pick., 40, it was held that a sale of real estate upon execution, which left in the owner the right of redemption, was not a breach of a condition in the policy which provided, "*that if the property should be sold*

Hammel vs. Queen's Ins. Co. of London and Liverpool.

or conveyed, in whole or in part, the policy should be void."

It is said in the head-note to this decision, that the court also held "that the provision in the policy referred only to a voluntary conveyance;" but we find no mention of that fact in the opinion delivered in the case.

In *Loy v. Ins. Co.*, 24 Minn., 315, it was held that, under a policy containing the exact language contained in the policy in this case, the giving of a mortgage by the holder of the policy on the property insured, and a sale made upon the mortgage by advertisement, which left a right of redemption in the policy-holder at the time of the loss, did not avoid the policy, and was not a breach of the condition. The court in this case state the rule adopted by all the courts in construing contracts of this kind, in the following clear and very plain manner:

"The question for consideration is, whether the foreclosure sale was a 'sale, transfer, or change of title' within the meaning of the foregoing condition, such as avoided the policy.

"In construing a condition of this character, if, upon consideration of the whole contract, it is uncertain whether the language of the stipulation is used in an enlarged or restricted sense, or if it is fairly open to two constructions, one of which will uphold and the other defeat the claim of the insured to the indemnity which it was his object in making the insurance to obtain, that should be adopted which is most favorable to the insured and most in harmony with such, the main purpose of the contract on his part. The reasons for this are twofold: The tendency of any such stipulation is to narrow the range and limit the force of the underwriter's principal obligation. It is also inserted by him for his own benefit, and in language of his own choice. If any doubt arises as to its meaning, the fault is his in not making use of more definite terms in which to express it. Hence the rule of strict construction against him, and the liberal one in favor of the assured, which prevail under such circumstances."

Hammel vs. Queen's Ins. Co. of London and Liverpool.

This case, we think, cannot be distinguished from the case at bar. It might be urged that there is a distinction between the case of executing a mortgage upon the premises under which no sale had been made, and the sale of real estate upon execution, so far as the two things affect what insurance men call the moral hazard. In the case of the mortgage before sale the insured would be personally liable to pay the mortgage debt, whether the mortgaged premises were burned or not; but after a sale upon execution, the personal liability to pay the debt to the amount bid on such sale is extinguished, and the purchaser takes the risk of the loss, if the property be destroyed by fire or otherwise before he becomes entitled to a conveyance of the title and possession under it. In the case last cited, the purchaser took the same risk after he purchased at the mortgage sale, and the personal liability of the assured was extinguished when the sale was made, although, as in the sale on execution, the right of redemption remained in the assured, as well as the title, until the time arrived when the purchaser was entitled to his deed.

In the following cases it is held that executory contracts for the sale of the insured property do not avoid the policy under similar conditions: *Phœnix Ins. Co. v. Lawrence*, 4 Metc. (Ky.), 9; *Masters v. Ins. Co.*, 11 Barb. (N. Y.), 624; *Clinton v. Ins. Co.*, 45 N. Y., 454; *Phillips v. Ins. Co.*, 10 Cush., 350; *Hill v. C. V. Mut. Protection Co.*, 59 Pa. St., 474; *Washington Fire Ins. Co. v. Kelly*, 32 Md., 421; *Jackson v. Ins. Co.*, 16 B. Mon. (Ky.), 242; *Power v. Ins. Co.*, 19 La., 28; *Hutchinson v. Wright*, 25 Beav., 444. The last case was a marine insurance, and before loss the assured transferred his interest to a third person by an absolute conveyance, and his vendee was entered as owner on the register; but upon the trial it was proved that the transfer was in fact a mortgage. The defendant insisted that the policy was avoided under two provisions of the association. The first was, that if *the ship was sold the risk should cease from the date of the sale, unless*

Hammel vs. Queen's Ins. Co. of London and Liverpool.

notice was given to the secretary. No notice of sale or mortgage either was given to the secretary. The other provision was, "that no vessel *which is mortgaged* shall be insured, unless the mortgagee give a written guaranty," etc. No such guaranty had been given. It was held that the plaintiff could recover, notwithstanding the form of his conveyance, upon proof that it was intended as a mortgage in fact; and, second, that the mortgage given after the insurance was not a violation of the second provision.

It seems to us that the words used in the condition in this policy clearly look to such a sale, transfer or alienation as passes the title and carries with it the right of possession. Such is the definition of the words "sold," "transferred," "alienated;" and, if they are made to include a sale upon execution, it is by giving them a meaning which they do not ordinarily receive. The added words, "change in the title or possession," do not extend the meaning. It is the title to the estate which is to be changed, not a mere right which may or may not ripen into a change of title. If the words "whether by legal process or judicial decree" were omitted, the condition would read: "If the property be sold or transferred, or any alienation or change takes place in the title or possession by voluntary transfer or conveyance." If that were the condition, it would be quite clear that the sale, transfer, alienation, or change of title would not include a mere agreement to sell, where the legal title still remained in the vendor, for the reason that such agreement would not be a transfer or conveyance of such property or the title, unless the possession were transferred in fact to the purchaser.

If the plaintiff had made a written agreement with his judgment creditor to convey the title to him in satisfaction of his debt, or any definite part thereof, such conveyance to be made one, two, or ten years after the date of the contract, unless within that time he paid the amount of the judgment, or such part of it as was agreed upon, with interest, the plaintiff to have

The State and another vs. Siegel.

the right of possession, occupation and use of the premises in the mean time the same as if no such contract had been made, it seems to me that under all the authorities such agreement would not have been a breach of this condition. It would not have been a sale, transfer, alienation, or change of title or possession. It would simply be a contract to make a sale, transfer, alienation or change of title in the future, subject to a condition which would avoid the contract if complied with by the plaintiff. There would be no present change of title; and it seems clear that the words in the policy should be construed to mean a present change, and not a mere agreement for a change in the future. The contract above supposed is, in fact, the contract which the law makes for the parties upon an execution sale of real estate under the laws of this state.

We think the execution sale was not a breach of the condition in the policy.

By the Court.—The judgment of the circuit court is affirmed.

THE STATE and another vs. SIEGEL.

December 13, 1891—January 10, 1892.

"*Legally laid out roads*" defined.

In sec. 1227, R. S. (which requires, under a penalty for neglect, the erection of guide-boards at certain points), the words "*legally laid out roads*" apply only to roads laid out by the authorities in accordance with the statute upon that subject, and not to roads which have become such by mere use or dedication.

APPEAL from the Circuit Court for *Outagamie* County.

The case is stated in the opinion.

For the appellant there was a brief by *O. F. Weed* and *Barnes & Goodland*, and oral argument by *Mr. Goodland*.

For the respondents there was a brief by *Kennedy & Hammel*, and oral argument by *Mr. Hammel*.

The State and another vs. Siegel.

ORTON, J. This is an action *qui tam* to recover penalties against the defendant, as chairman of the town board of supervisors, for neglecting to erect guide-boards at the intersection of certain main traveled and legally laid out roads, under section 1227, R. S. The plaintiff, on the trial, failed to prove that such roads had ever been laid out according to the provisions of the statute for laying out highways, but offered to prove that they had been used by the public as highways for over twenty years, which offer was refused, and a nonsuit was granted. The only question, therefore, is whether the language of the statute, "legally laid out roads," means such roads only as have been laid out according to the statute providing for the laying out of highways, or may be construed to embrace highways which have become such by mere user or dedication. I have been particular in the use of words to clearly define the two different methods by which traveled roads become highways, because it is plausibly contended that the language, "legally laid out roads," includes such as are "legally" laid out by user or dedication, as well as such as are legally laid out by the action of the town authorities according to the statute, and that both classes of highways are properly called "legally laid out." No case was cited on the argument in which this precise language has received judicial interpretation, and therefore, aside from cases in which language somewhat similar has been construed, the ordinary rules of statutory interpretation must be resorted to.

Language nearest in terms and signification to that here used, and in a statute in the same sense *quasi* penal, is found in the statutes of this state and in some other states, in respect to encroachments upon a highway which "shall have been laid out and opened," and providing a forfeiture, against the person guilty of the encroachment, of fifty cents for every day of its continuance after the service upon him of an order for its removal. In *Soule v. State*, 19 Wis., 593, it was decided merely, in respect to this question, that in an action to recover

The State and another vs. Siegel.

this forfeiture the highway must be shown to have been "laid out and opened." In *State v. Huck*, 29 Wis., 202, it was decided that, "it being a penal statute, [it was] therefore to be strictly construed," and "whether such highway had been 'laid out' or not, involved no more than an inspection of the records in the office of the town clerk, to ascertain if such an order had been made by the proper officers." This would appear to be an authoritative decision of the question, and that the words "laid out," as used in the statute, mean laid out according to the provisions of the statute for laying out highways. But the learned counsel of the appellant contends that there is a reversal of this construction in the opinion of Mr. Justice LYON in *State ex rel. Reynolds v. Babcock*, 42 Wis., 138. It is proper to say that the question was not involved in that case, as the highway was sought to be shown only by the records, and the evidence was held by this court to have been sufficient. The use of the language "it is quite probable," as an introduction to the intimation "that the term 'laid out,' as employed in the statute, is sufficiently comprehensive to include any act or process by which the public obtains the right of way in lands," etc., and the language, "but be this as it may," as the conclusion, shows clearly enough that no decision of the question was intended to be made. But, be this as it may, we are now clearly of the opinion that the construction of this term in *State v. Huck*, *supra*, restricting it to highways laid out in the manner prescribed by the statute, was the correct and the only proper construction of it. In the states of New York and Michigan the same term is used in a like statute, and the same construction given to it. *Doughty v. Brill*, 36 Barb., 488; *Christy v. Newton*, 60 Barb., 332; *Talmage v. Huntting*, 29 N. Y., 447; *Parker v. People*, 22 Mich., 93; *Roberts v. Highway Com'rs*, 25 Mich., 23; *People v. Smith*, 42 Mich., 138.

The language of this statute is much stronger as signifying action upon the part of the town authorities according to the

The State and another vs. Siegel.

provisions of the statute. The term "laid out" is qualified by a word which by common usage signifies affirmative action according or in conformity to law, and the whole phrase "legally laid out" clearly implies a legal procedure; and when the word "legally" is used in connection with highways, it is commonly understood to mean a highway laid out according to the specific requirements of law, in contradistinction from highways which have become such by prescription or dedication. The phrase "laid out" is participial, from the active verb "to lay," meaning to establish, and implies a nominative or actor. It is implied that some one is active in laying out the highway, and "legally laid out" signifies that this is done by those authorized by law, and in the manner fixed or required by law. According to common rules of construction there should be *certainty* in such a statute. There should be some certain means by which the chairman of the town can know that the intersecting roads are legal highways. There would be little *certainty* in his best attempts to ascertain whether they have become such by prescription or dedication, and it would be most unreasonable to hold him responsible and make him liable to pay a penalty if he should make a mistake in determining such an important and difficult question. In respect to highways which appear of record, he can know, with as much certainty as it is possible to know what has been legally done which appears of record, what are legally laid out highways. In enforcing a forfeiture for encroaching upon a highway, the location of the road must be certain and fixed, to warrant a recovery (*Galbraith v. Littiech*, 73 Ill., 209); and the location and boundaries of a highway by mere user could not be known with any certainty in most cases, if in any. We think that the legislative intention is clearly manifest by the use of these apt and well known terms. The single word "highway" would express all that it is claimed these three words "legally laid out" express. If the legislature intended to hold the chairman of the town liable to this penalty for neglecting to

 Campbell vs. Campbell.

put up guide-boards at the intersection of all highways *de facto*, or highways which are laid out according to the statute, or which become such by user or by dedication, why was it not so expressed? They have used words which clearly mean, by common acceptance, highways which have been laid out according to law by the proper officers of the law, and if they have not this meaning they have none whatever. Both by reason and authority the construction given to this statute by the circuit court was clearly correct.

By the Court.—The judgment of the circuit court is affirmed.

CAMPBELL VS. CAMPBELL.

December 14, 1881—January 10, 1882.

SLANDER. (1) *In what sense words to be taken.* (2) *Case stated; nonsuit improperly granted.* (3) *Proof of the person to whom the words referred.* (4) *Plaintiff's character as affecting damages.*

1. In slander, in determining whether words are actionable *per se*, they are to be taken in the sense in which they would naturally be understood by those who heard them.
2. The words, "she is slow poisoning her husband," are capable of being understood as charging the giving of poison with intent to kill; and where that meaning is attributed to them by proper innuendoes, and there is sufficient evidence to support a finding that they were so intended, a nonsuit should be denied.
3. The plaintiff was allowed to testify that she understood the words complained of as referring to her. She also testified to facts showing clearly that such was the reference of the words. *Held*, that the admission of the evidence was not ground of reversal.
4. The court charged the jury to consider "all the evidence on both sides touching the moral character of the plaintiff," but did not definitely state what effect, if any, such character should have in determining the amount of damages; and it refused to charge that in actions for slander "a person of bad character is not entitled to the same measure of damages as one of good character;" and that if plaintiff's "general character" was bad, that fact must be considered in determining the damages. *Held*, that such refusal was error.

Campbell vs. Campbell.

APPEAL from the Circuit Court for *Outagamie* County.

This is an action for damages for speaking of and concerning the plaintiff the words "She is slow poisoning her husband," thereby meaning that she was feloniously and maliciously administering poison to her husband, a brother of the defendant, and then very sick, with the intent to kill and murder him. There was a verdict and judgment for the plaintiff; and defendant appealed from the judgment.

For the appellant there was a brief by *Barnes & Goodland*, and oral argument by *Mr. Goodland*:

1. The court erred in admitting the evidence of the plaintiff as to who was referred to in the conversation testified to by her. Townshend on S. and L., p. 148, note 2, and p. 652 and cases cited in note; 2 Starkie on Slander, 32; *Ryckman v. Delavan*, 25 Wend., 186; *Gibson v. Williams*, 4 id., 320; *Van Vechten v. Hopkins*, 5 Johns., 211; *Mix v. Woodward*, 12 Conn., 263; *Snell v. Snow*, 13 Met., 278; *State v. Jendall*, 5 Harr. (Del.), 475; 32 Pa. St., 273; *Rangler v. Hummel*, 37 Pa. St., 130; *McCue v. Ferguson*, 73 id., 333; *Briggs v. Byrd*, 11 Ired. Law, 353; *McLaughlin v. Bascom*, 38 Iowa, 660. • There are cases which hold that the judgment of witnesses acquainted with the parties and circumstances, as to the defendant's intention and application of the words, may be admitted in evidence for the information of the jury; but the weight of authority is against such a rule. And even if that should be held to be the correct rule, it should be limited to witnesses who are presumed to be impartial, and not be extended to include the parties, who are generally so affected by passion and prejudice that an opinion from them would only tend to mislead. 2. Defendant's motion for a nonsuit should have been granted. Standing alone, the words charged were not in themselves slanderous. They were capable of a meaning entirely different from that claimed in the complaint; and there was nothing in the evidence to show that they were used with the intent and meaning charged. Admitting that the

Campbell vs. Campbell.

plaintiff was the person alluded to, they might have been used to convey the idea that she was pursuing a mistaken course of treatment with her husband, in regard to diet, medicine or drink, without imputing any malicious or felonious intent. If the *act* charged does not itself constitute an offense, or may be an offense or not according to circumstances, the circumstances required to make it such must have been included in the statement made, or the words are not actionable *per se*. Or they must be used in relation to such a condition of things as to make it plain that they were intended to charge a crime, or they are not actionable at all. Thus the words, "He has set his hop-house on fire and burned it up," do not *per se* impute a felonious burning. *Frank v. Dunning*, 38 Wis., 270. To say of another "You swore falsely in a suit" is not actionable *per se*, because the words standing alone do not impute the crime of perjury. *Vliet v. Rowe*, 1 Pin., 413; *Weil v. Altenhofen*, 26 Wis., 708; *Weil v. Schmidt*, 28 id., 137. 3. The court erred in limiting the jury to the consideration of the "moral character" of the plaintiff in fixing the amount of damages. Probably nine persons out of ten, including many very intelligent persons, would understand the phrase "moral character," as applied to a woman, to mean her character for chastity; and such was no doubt the meaning attributed to it by the jury in this case. 4. The instruction asked by the defendant, that, in an action of this kind, a person of bad character is not entitled to the same measure of damages as one of good character, etc., was correct (—— *v. Moor*, 1 M. & S., 284; *Haskins v. Lumsden*, 10 Wis., 359; *B. v. I.*, 22 id., 372; *Wilson v. Noonan*, 27 id., 598; *Maxwell v. Kennedy*, 50 id., 645), and was not covered by the general charge. The defendant had a right to require a pointed, explicit and positive instruction upon the question. *Livingston v. Ins. Co.*, 7 Cranch, 506; *Etting v. Bank of U. S.*, 11 Wheat., 59; *Taylor v. Hillyer*, 3 Blackf., 433; *Plummer v. Gheen*, 3 Hawks, 66; *Washburn v. Tracy*, 2 D. Chip., 128; *Fletcher v. Howard*, 2

Campbell vs. Campbell.

Aik., 115; *Zabriskie v. Smith*, 13 N. Y., 322; *Rogers v. Brightman*, 10 Wis., 55; *Roberts v. McGrath*, 38 id., 52; *Wheeler v. Konst*, 46 id., 398; *Tupper v. Huson*, id., 646; *Connors v. State*, 47 id., 523; *Lela v. Domaske*, 48 id., 623.

For the respondent there was a brief by *W. J. Allen* and *Kennedy & Hammel*, and oral argument by *Mr. Allen* and *Mr. Hammel*:

1. If the plaintiff had not testified that she understood the words uttered by defendant in her hearing as applied to her, the jury must necessarily have inferred that such was their application, from all the testimony. No harm, therefore, resulted to the defendant from the admission of this part of plaintiff's testimony, even if it was improper. 2. The nonsuit was properly denied. The words charged were actionable *per se*, even without the aid of innuendoes. They cannot be understood otherwise than as imputing a criminal offense. *Townshend on S. & L.*, 238, § 128, and 253, § 170. The words must be taken according to their natural and proper import, and in the same sense in which any reasonable bystander would apply them. 5 *Wait's Act. & Def.*, 749, § 5, and cases there cited; *Montgomery v. Deeley*, 3 Wis., 709; *Weil v. Schmidt*, 28 id., 137; *Hayes v. Ball*, 72 N. Y., 418. Where the words are capable of two constructions, and there are proper innuendoes pointing out the injurious meaning, the question whether they were used in that sense is for the jury. *Townshend on S. & L.*, §§ 142, 281, 338; *Hayes v. Ball*, *supra*; *Frank v. Dunning*, 38 Wis., and cases there cited. 3. There was no error in instructing the jury to consider plaintiff's "moral character" in determining damages. "Moral character" is a more comprehensive phrase than "general good character." See the word "moral" in *Richardson's dictionary*. 4. The instruction asked by defendant on this point was substantially covered by the general charge, and was therefore properly refused. *Thompson on Charging the Jury*, § 92, and cases there cited; *Osen v. Sherman*, 27 Wis., 501; *Karasich v. Hasbrouck*, 28

Campbell vs. Campbell.

id., 569; *Urbanek v. Railway Co.*, 47 id., 59. 5. The whole record shows that the verdict in respect to damages was inadequate rather than excessive; and for that reason the defendant is not entitled to a new trial. Thompson on Charging the Jury, 158, 161, 162; *Appleton v. Barrett*, 29 Wis., 221; *Cronin v. Delavan*, 50 id., 375.

CASSODAY, J. It is urged that the words spoken were not slanderous *per se*; that their meaning could not be enlarged by innuendoes; and that, as there was no proof of special damage, the verdict must be set aside as against evidence.

It was held by Lord HOLT, C. J., that the court "would give no favor to words, and would give satisfaction to them whose reputation is hurt; and would take words in a common sense according to the vulgar intendment of the bystanders. The rule *de minori sensu* is to be understood, where the words in their natural import are doubtful, and equally to be understood in the one sense as in the other." *Somers v. House*, Holt, 39.

In a much later case, the same court, per Lord ELLENBOROUGH, C. J., said: "Words are now construed by courts, as they always ought to have been, in the plain and popular sense in which the rest of the world naturally understood them." *Roberts v. Camden*, 9 East, 95. So in *Hankinson v. Bilby*, 16 M. & W., 443, PARKE, B., giving the true test, said: "First ascertain the meaning of the words themselves, and then give them the effect any reasonable bystander would affix to them."

In *Peake v. Oldham*, 1 Cowper, 275, affirming the same case in error from the common pleas, Lord MANSFIELD, C. J., held the speaking of the words, "I am thoroughly convinced that you are guilty, and rather than you should go without a hangman I will hang you," with innuendoes, sufficient to sustain a verdict for the plaintiff. In that case it was said by the court at common pleas that "it [the innuendo] is not, there-

Campbell vs. Campbell.

fore, contradictory, but explanatory; not introductory of new matter, but ascertaining the meaning of the old, and limiting the general word 'death' to one particular species of it, 'murder.' The innuendo is therefore sufficiently regular; whether it was true or not that such was the defendant's meaning, was a fact for the jury to decide upon." 2 W. Bl., 961. In giving the opinion the chief justice refers to and follows the old case of *Ward v. Reynolds*, where the gist of what the defendant said to the plaintiff was, "He [your husband] died of a wound you gave him;" and it was held that the jury were justified in finding "that the defendant meant a charge of murder." The chief justice then, referring to the case before him, added: "So, here, if shown to be innocently spoken, the jury might have found a verdict for the defendant; but they have put a contrary construction upon the words as laid," and therefore the judgment was affirmed. 1 Cowper, 278. That ruling was subsequently sanctioned in *Roberts v. Camden*, *supra*.

In *Blagg v. Sturt*, 10 Ad. & Ell. (N. S.), 899, it was "held by the court of exchequer chamber, affirming the judgment of the Queen's Bench, that it is for the judge to decide whether a publication is capable of the meaning ascribed to it by an innuendo, and for the jury to decide whether such meaning is truly ascribed to it." See also *Strader v. Snyder*, 67 Ill., 406; *Goodrich v. Davis*, 11 Met., 473; *Montgomery v. Deeley*, 3 Wis., 709; *Weil v. Schmidt*, 28 Wis., 137.

This case seems to be clearly distinguishable from *Frank v. Dunning*, 38 Wis., 270; *Weil v. Altenhofen*, 26 Wis., 708; *Vliet v. Rowe*, 1 Pin., 413; *Bloss v. Tobey*, 2 Pick., 320; *Carter v. Andrews*, 16 Pick., 1; *Snell v. Snow*, 13 Met., 278. It is more analogous to *Weil v. Schmidt*, 28 Wis., 137; *Cottrill v. Cramer*, 43 Wis., 242; and particularly *Ward v. Reynolds* and *Peake v. Oldham*, *supra*; *Geary v. Bennett*, 53 Wis., 444. In the case last cited, the slanderous words spoken were: "There is a foreign substance in your milk, similar to water,

Campbell vs. Campbell.

and it is watered;" and they were held, on demurrer, in view of our statute, actionable *per se*.

Here the defendant charged the plaintiff during the last sickness of her husband, and when she was his sole nurse, with "slow poisoning her husband." Under our statute, the administering of poison in food, drink or medicine, with the intent to kill or injure a human being, is a crime punishable by confinement in the state prison. Sections 4384, 4374, 4337, R. S. Here the evidence tends to prove that the defendant, on being asked the condition of his brother, replied: "She is slow poisoning him, the termagan;" or, "That termagan is slow poisoning him;" or, "He is failing, and she, I think, is dosing him with slow poison." Then, on being asked why he did not "see into it," or "look about it," he answered: "Wait till he is dead; my brother in Oshkosh will skin her alive, and I will see her in prison;" or, "Wait; if he dies, my brother in Oshkosh will skin her alive, and I will have her in prison—in state's prison." The objection that the plaintiff was allowed to testify that she supposed the defendant referred to her when he used the word "termagan," would seem not to be well taken, especially as she testified in another connection that in the conversation "my name was mentioned," "the conversation referred to my husband and myself," and all the evidence tended to show it could not refer to any one else. Opinions of witnesses as to the person to whom pronouns and ambiguous words applied, have, however, been allowed by the courts. *Miller v. Butler*, 6 Cush., 72; *Leonard v. Allen*, 11 Cush., 241; 2 Greenl. Ev., § 417. It seems, however, that before a witness will be allowed to give his opinion that words were used in some other than their ordinary sense, the foundation must first be laid by proving facts giving a peculiar character to the expressions used. *Daines v. Hartley*, 3 Exch., 200. But here the error, if any, was cured by the nature of the evidence given.

Within the rule laid down by the exchequer chamber, with

Campbell vs. Campbell.

the sanction of Lord DENMAN, C. J., above quoted, and which we approve, it would seem that the trial court here could not do otherwise than hold that the words spoken were capable of the meaning ascribed to them by the innuendoes, and that the jury were justified by the evidence in holding that such meaning was truly ascribed to them. This being so, the nonsuit was properly denied. If it be conceded that we are correct in this, it will hardly be contended that the damages awarded were excessive.

Was there any error in charging or refusing to charge the jury? The court charged the jury to consider, among other things, "all the evidence on both sides touching the *moral* character of the plaintiff," but was silent, or at least left it somewhat vague or indefinite, as to what effect, if any, good or bad character should have in determining the amount of damages to be awarded. Accordingly, the counsel for the defendant requested the court to charge, in effect, that "in actions of this kind a person of bad character was not entitled to the same measure of damages as one of good character;" and if they found for the plaintiff, and also found that her "general character" was bad, "such bad character must be considered by" them in fixing the amount of damages, and that they were at liberty to find a verdict for the plaintiff for nominal damages only. The court did tell the jury that they had "the right to give nominal damages," but nowhere gave the substance of what was contained in the other portion of the instructions so requested. In actions of slander, it is well settled that the plaintiff's general character is involved in the issue; and evidence showing what it is, and consequently its true value, may be offered on either side to affect the amount of damages. 2 Greenl. Ev., § 275; *Earl of Leicester v. Walter*, 2 Campb., N. P., 251; *Larned v. Buffinton*, 3 Mass., 546; *Stone v. Varney*, 7 Met., 86; *Burnett v. Simpkins*, 24 Ill., 264. The rule thus stated has frequently received the sanction of this court. *Maxwell v. Kennedy*, 50

Campbell vs. Campbell.

Wis., 645; *Wilson v. Noonan*, 27 Wis., 599; *B—— v. I——*, 22 Wis., 372; *Haskins v. Lumsden*, 10 Wis., 359. Whether plaintiff, in the first instance and before his character has been assailed, can give evidence of his own good character, it is not necessary here to decide. The question of character, therefore, being involved, and under the evidence made material for the jury to consider, was it error to refrain entirely from instructing the jury as to the effect of such evidence upon the amount of damages to be awarded? The decisions of this court lead to the conclusion that a party has a right to a direct and positive instruction upon a point material to the issue and the evidence, if requested in time; and if such request is refused, and the point involved therein is not covered by the general charge, or is left vague or indefinite, the judgment will be reversed. *Rogers v. Brightman*, 10 Wis., 55; *Roberts v. McGrath*, 38 Wis., 52; *Wheeler v. Konst*, 46 Wis., 398; *Tupper v. Huson*, id., 647; *Connors v. State*, 47 Wis., 523. Similar rules have been adopted by other courts. *Livingston v. Ins. Co.*, 7 Cranch, 544; *Taylor v. Hillyer*, 3 Blackf., 433; *Washburn v. Tracy*, 2 D. Chip., 128; *Fletcher v. Howard*, 2 Aikens, 115; *Plummer v. Gheen*, 3 Hawks, 66; *Zabriskie v. Smith*, 13 N. Y., 322.

Because the court did not conform to this well established rule in the particular mentioned, the judgment of the circuit court must be reversed, and the cause remanded for a new trial.

By the Court.— So ordered.

Tresice and another vs. Barteau.

TRESICE and another vs. BARTEAU.

December 14, 1881 — January 10, 1882.

DEDICATION: ADVERSE POSSESSION. (1) *What essential to validity of dedication.* (2, 3) *Evidence as to dedication, and as to adverse possession.*

1. There cannot be a dedication to a limited portion of the public; and an acceptance by the public is necessary to a valid dedication.
2. Words purporting to grant a strip of land to a city, inserted in a deed to a third person of lots adjoining such strip, while of no effect as a conveyance to the city, may be evidence of the grantor's intent to dedicate such strip to the public.
3. On the question whether a certain strip of land in a city is a public alley, evidence is admissible to show that such strip has been taxed by the city ever since its organization; that it has been sold by the county, with other lands, for taxes, and deeds given on such sales; that it appeared as an alley on none of the authorized maps of the city; that the city has never authorized or accepted the dedication; that the strip has never been used by the public, but only by the adjoining lot-owners; and that plaintiff went into possession of it more than ten years before the action, and fenced it in with her adjoining lot, has cultivated and built upon it, and has paid taxes upon it every year for about ten years, except when it was sold for taxes; such evidence tending strongly to show both a non-acceptance of the alleged dedication, and a title in plaintiff by adverse possession. *Lemon v. Hayden*, 13 Wis., 160, distinguished.

APPEAL from the Circuit Court for *Outagamie* County.

This action was brought by a married woman and her husband for a trespass upon her land in that the defendant unlawfully entered upon the same and piled timber thereon. The answer, in addition to a general denial, alleged that the land in question was a public way or alley, and that defendant owned land immediately adjoining it. The court found the facts in defendant's favor; and from a judgment pursuant to the finding, plaintiffs appealed.

For the appellants there was a brief by *George C. Dickinson* and *Barnes & Goodland*, and oral argument by *Mr. Barnes*

Trerice and another vs. Barteau.

For the respondent there was a brief by *Collins & Pierce*, and oral argument by *Mr. Pierce*.

COLE, C. J. The contention on the trial was, whether the *locus* where the alleged trespass was committed, was a public alley or the private property of *S. A. Trerice*. The court below held that it had, for a long time prior to the act complained of, been a public alley or thoroughfare. The four deeds offered in evidence, which were executed by David Kimball, conveying lots bounded by the alley, were certainly competent to show that Kimball, the owner of the land, had dedicated to the public use a strip in the rear of the defendant's lot, twenty feet wide, and extending north from Edwards street 106 feet, as and for a public street. Some of the deeds contain words of grant purporting to convey the strip to the city of Appleton; but as the city was a stranger to these deeds, it is doubtful if any other or different effect can be given them than to say, as in *Barteau v. West*, 23 Wis., 416, that they clearly show an intention on the part of the owner to dedicate the strip for a public alley. There could not be a dedication to a limited part of the public (*Tupper v. Huson*, 46 Wis., 646), and the language of the instruments repels any inference that there was an intention to restrict the dedication, if it were competent for the owner to do so. But it is elementary law, that to constitute a valid dedication there must not only be an intention on the part of the owner of the land to dedicate, but there must also be an acceptance of the dedication by the public. It was claimed in this case that the city of Appleton had never in fact accepted the dedication of the alley to the public use, nor in any manner recognized it as a public way. And, as tending to prove such non-acceptance of the dedication, the plaintiff offered to show that the strip in question had been taxed by the city of Appleton ever since it had been a city; that it, with other lands, had been sold by the county for taxes, and tax deeds given; that upon none of the authorized plats

Trerice and another vs. Barteau.

of the city does this alleged alley appear; that the city has never recognized nor accepted the dedication of the alley; that it has never been used by the public, but only by the adjoining lot-owners; that the plaintiff *S. A. Trerice* went into possession of the strip about the year 1866, and fenced the same with her adjoining lot; and that she has cultivated the alley, has improved and placed buildings upon it, and has paid taxes on it every year since the first tax deed was given, in May, 1868, except when it was sold for taxes. All this evidence was objected to, and excluded by the court. It seems to us that this evidence was pertinent to the issue, and was improperly ruled out. It surely tended very strongly to prove a non-acceptance of the dedication of the alley by the public authorities. Nay, more; it was calculated to establish the fact that the plaintiff *S. A. Trerice* had been in the adverse possession of the strip under claim of title exclusive of any other right, founding such claim upon written instruments as being a conveyance of the strip, for more than ten years, or until the bar of the statute had run in her favor.

But it was urged by the learned counsel for the defendant, that the mere fact that the land over which the alley ran was taxed by the city, would not justify the inference that the grant or dedication had not been accepted by the public. But that fact, taken in connection with the other facts which the plaintiff proposed to prove, namely, that the city had never in any way recognized the alley as a public way, and that it had never been used as such by the public, but had been enclosed by a fence for years with the plaintiff's lot, and had been occupied, improved and exclusively used as private property — would raise an irresistible presumption that the dedication had never been accepted, and that the public authorities declined to accept it. It may well be, as the same counsel argue, impossible for the city to set watchmen who will guard its highways and alleys against the encroachments of avaricious people, who are on the alert to appropriate that to which they have no exclu-

Strasser vs. Conklin.

sive right, or to prevent some blundering assessor from assessing public streets for taxation; but it is reasonable to suppose that the local authorities would not suffer its highways to be taxed and sold, and tax deeds given upon them, and then let them be fenced up and used as private property, for a series of years, without asserting the rights of the public in the matter.

In the case of *Lemon v. Hayden*, 13 Wis., 160, the highway, though taxed by the city and county authorities, was continuously and publicly used as a highway; consequently it was held that the acts of the city and county officers in taxing it and selling it for taxes were really no evidence that the public did not regard and treat it as a highway by dedication. But that case, in its leading facts, is so unlike the one at bar as to require no comment to mark the distinction. It must also be borne in mind that this is not a dedication of the alley by means of a plat which was made out, certified, acknowledged and recorded in conformity to the statute upon the subject, so as to bring the case within the doctrine of *Jarstadt v. Morgan*, 48 Wis., 245, and that class of cases. It was proposed to show that the alley did not appear upon any authorized map or plat of the city or of block 38. And in any view which we have been able to take of the case, it seems to us the judgment of the circuit court must be reversed, and a new trial awarded.

By the Court.—It is so ordered.

STRASSER VS. CONKLIN.

December 14, 1881 — January 10, 1882.

Ratification.

One who accepts, with knowledge of all the facts, the avails of a compromise and settlement of a controversy, made in his behalf without authority, thereby ratifies the settlement; and ratification in that manner of a part of the unauthorized transaction is a ratification of the whole.

Strasser vs. Conklin.

APPEAL from the Circuit Court for *Outagamie* County.

The facts in this case are substantially as follows: One Fisher sold and conveyed to one Craney two lots in the village of Seymour, on which was a hotel. Craney gave Fisher his promissory notes (presumably for purchase money) for \$2,300, and executed to Fisher a mortgage on the lots to secure payment thereof. These securities are dated February 26, 1876. At the same time Fisher assigned to Craney two policies of insurance for \$12,000 each, on the personal property in such hotel; and the policies, in case of loss, were made payable to Fisher as his interest might appear. March 13, 1876, Fisher sold and transferred the notes and mortgage of Craney to the plaintiff. April 1, 1876, Craney and wife conveyed the mortgaged premises to the defendant. The consideration expressed in the deed is \$4,000. It contains the covenants usual in a warranty deed, with the following limitation or exception to the covenants of seizin and against incumbrances: "Except a mortgage thereon for the sum of \$2,300, dated February 26, 1876." At the same time Craney assigned to the defendant both of said policies of insurance. About June 1st one of the policies expired, and the defendant procured its renewal. Without the direction of the defendant, the renewed policy also provided that the loss, if any, should be payable to Fisher as his interest might appear. The defendant paid Craney \$1,700 on account of the purchase money, and it does not appear that he gave any note or written acknowledgment for the residue thereof. Soon after the transactions above stated, the hotel building and some or all of the insured property was destroyed by fire. The loss was afterwards adjusted between the defendant and the insurers at \$795.27, and drafts for that amount, payable to the defendant and Fisher, were forwarded to the agent of the insurance companies at Appleton. Fisher had ceased to have any interest in the insurance money, but plaintiff claimed the money by virtue of the assignment to him of the Craney mortgage. The defendant claimed that

Strasser vs. Conklin.

the money belonged to him absolutely, and refused to assign the policies to the plaintiff upon request of the latter. July 3, 1876, the plaintiff gave one Herman Erb, of Appleton, a power of attorney authorizing him to collect and receive the money on said policies. Erb thereupon assumed to act as the agent of the plaintiff in respect to his whole business with the defendant, and entered into an agreement with the latter on behalf of the plaintiff, to the effect that the plaintiff should receive from the insurance agent \$653.27 of the insurance money, and from the defendant a conveyance of the mortgaged premises in full payment and satisfaction of his claim against the defendant on the Craney mortgage. The plaintiff was soon after fully informed of what Erb had done in his behalf, and the terms of the settlement negotiated by him with the defendant. Having such information the plaintiff received the above amount of insurance money from Erb, but, at the same time, denied his authority to make the settlement, and refused to accept the conveyance of the mortgaged premises which the defendant had duly executed and left with Erb. The plaintiff has not offered to return such insurance money to the defendant, but has applied it upon the Craney mortgage. This action was brought to recover the balance of the mortgage debt of \$2,300, after deducting therefrom the insurance money received by the plaintiff. It is alleged in the complaint, and the testimony tends to prove, not only that the defendant purchased the mortgaged premises subject to the Craney mortgage, and that the amount of the mortgage debt was deducted from the price agreed to be paid for the premises, but also that he expressly agreed with Craney, by parol, to pay such debt. On the other hand, the defendant denies in his answer and in his testimony that he made any such agreement. He also alleges the settlement with Erb, the payment to the plaintiff of the insurance money, and the execution of the conveyance of the mortgaged premises to him, as an accord and satisfaction of the cause of action stated in the complaint. On the

Strasser vs. Conklin.

foregoing facts, which appear from the pleadings and proofs, the court directed the jury to find for the defendant, and they did so. The plaintiff appealed from the judgment entered pursuant to the verdict.

For the appellant there was a brief by *Barnes & Goodland*, and oral argument by *Mr. Goodland*. They contended that plaintiff, in receiving and retaining the insurance money, merely kept what he claimed was legally and equitably due him, independently of the unauthorized agreement of the agent (*Hollenback v. Shoyer*, 16 Wis., 499); and that the most that could be claimed for the defendant in respect to a ratification by plaintiff of the agent's unauthorized settlement was, that it was a question of fact, which should have been submitted to the jury.

For the respondent there was a brief by *Collins & Pierce*, and oral argument by *Mr. Pierce*. To the point that plaintiff had fully ratified the settlement made by his agent, by taking and retaining the money paid by defendant on such settlement, they cited Story on Con., 3d ed., § 164; *F. L. & T. Co. v. Walworth*, 1 Coms., 433; *Palmerton v. Huxford*, 4 Denio, 166; *Armstrong v. Gilchrist*, 2 Johns. Cas., 424; *Saveland v. Green*, 40 Wis., 438; *Paine v. Wilcox*, 16 id., 217-18; *Beal v. Park F. Ins. Co.*, id., 246; *Fargo v. Ladd*, 6 id., 106; *Reid v. Hibbard*, id., 175; *Ballston Spa Bank v. Marine Bank*, 16 id., 125.

LYON, J. There was a controversy between the parties as to whether the defendant, when he purchased the hotel property, agreed with Craney to pay the notes given by Craney to Fisher, and assigned by the latter to the plaintiff, and also as to whether the insurance money belonged to the plaintiff or to the defendant. These controversies were settled by the defendant and Mr. Erb, the latter assuming to act for the plaintiff. By the terms of the settlement the plaintiff was to receive \$653.77 of the insurance money, and a conveyance of the

Strasser vs. Conklin.

premises mortgaged by Craney to Fisher to secure the payment of the notes, and to release the defendant from all claim on the mortgage. This was declared to be a full settlement of all matters between the parties. The plaintiff afterwards received the insurance money thus stipulated to him. He did so with full knowledge that Erb had assumed to act as his agent in negotiating the settlement with the defendant, and with full knowledge of the terms of the settlement. The evidence of this is undisputed and conclusive. True, at the same time the plaintiff refused to accept the deed of the mortgaged premises, and denied that Erb had authority to make the settlement. But he received and retained the fruits of the settlement — the insurance money.

No rule of law is more firmly established than the rule that if one, with full knowledge of the facts, accepts the avails of an unauthorized treaty made in his behalf by another, he thereby ratifies such treaty, and is bound by its terms and stipulations as fully as he would be had he negotiated it himself. Also, a ratification of part of an unauthorized transaction of an agent is a confirmation of the whole. If authorities are desired to propositions so plain as these, they abound in the decisions of this court, many of which are cited in the briefs of counsel. Under the above rules it is entirely immaterial whether Erb was or was not authorized to make the settlement with the defendant. If not authorized, the plaintiff, by receiving the money with full knowledge of the terms of settlement, ratified and confirmed what he did, and cannot now be heard to allege his agent's want of authority.

It will not do to say that the plaintiff was entitled to the money he received, and might receive and retain it as his own without regard to the settlement. That was the very point of the controversy between the parties. Manifestly each claimed the money in good faith, and we cannot determine from the record before us which was entitled to it; and it is immaterial whether one or the other was so entitled, there being a real

 Borchardt vs. The Wausau Boom Co.

controversy between them on that question. It was therefore a very proper case for negotiation and compromise between them; and under the circumstances they must both be held bound by the settlement. The evidence of ratification is conclusive, and there was nothing for the jury to determine in that behalf. Hence, the court properly directed the jury to find for the defendant.

The foregoing views dispose of the case, and render it unnecessary to determine the question, which was very ably argued by counsel, whether a parol agreement by the defendant to pay the mortgage debt (if he so agreed) is within the statute of frauds, and therefore invalid. We leave that question undetermined.

By the Court.—The judgment of the circuit court is affirmed.

 BORCHARDT VS. THE WAUSAU BOOM COMPANY.

December 15, 1881—January 10, 1882.

FLOWAGE OF LAND. (1) *When not a cause of action.* (2) *What questions for the jury.*

REVERSAL OF JUDGMENT: (3) *For refusal to instruct.*

1. A company which has constructed works (in this case a boom) in a public river, in a proper manner and by authority of the legislature, is not liable for damages for flowage of land caused by an extraordinary freshet such as the company could not reasonably have anticipated and provided against, even though such damages may have been to some extent occasioned by the presence of such works in the river.
2. The question whether in a given case the freshet causing the danger was of such unusual and extraordinary character as to excuse a party from foreseeing and providing against it, is for the jury under proper instructions.
3. Where an instruction asked, which, though not in the best form, defines the law with substantial correctness, is rejected, and no correct instruction upon the same point is given, this is error, if prejudicial to the appellant.

Borchardt vs. The Wausau Boom Co.

APPEAL from the Circuit Court for *Outagamie* County.

Action for injury to plaintiff's land from flowage. Plaintiff had a verdict; a new trial was refused; and defendant appealed from a judgment pursuant to the verdict.

The principal question involved will sufficiently appear from the opinion.

For the appellant there was a brief by *Silverthorn & Hurley*, and oral argument by *Mr. Hurley*.

For the respondent there was a brief signed by *M. M. Charles*, his attorney, with *Finch & Barber*, of counsel, and a supplemental brief by *Finch & Barber*, and oral argument by *Mr. Charles* and *Mr. Barber*.

ORTON, J. This action is brought to recover damages to the premises of the plaintiff, situated above the works of the boom company on the Wisconsin river, by flowage caused by such works. The company was authorized to construct and maintain such works at that place, and in such manner, by a charter granted by the legislature of this state by chapter 45, P. & L. Laws of 1871. There was evidence tending to show that in ordinary seasons of high water said premises were not at all flowed, and that the great freshets, which, together with the works of the company, caused the flowage complained of, were uncommon, unusual and extraordinary, and could not have been reasonably contemplated, anticipated or expected at the time such works were constructed.

In *Cohn v. Wausau Boom Co.*, 47 Wis., 314, it was held that, under the amendment of its charter by chapter 256, Laws of 1873, this company was a *quasi* public corporation, and an agent of the state for the improvement of the Wisconsin river. The seventh instruction asked by the appellant was as follows: "I charge you that, if the evidence convinces you that the damages claimed were only incidental to an additional rise of water during extraordinary freshets, although such additional rise of water was caused by the temporary stoppage

Borchardt vs. The Wausau Boom Co.

of logs at defendant's works, the plaintiff cannot recover in this action." We think the refusal of the court to give this instruction was error. It was contended by the learned counsel of the respondent, that this instruction was in effect given in the general charge; but we are unable to find any part of the general charge containing this principle, viz.: that for damages occasioned solely by, and which were only incidental to, an additional rise of water in the river during extraordinary freshets, the company is not liable, notwithstanding they might have been to some extent occasioned by its works being in the river. These works were lawfully and rightfully in the stream, and the company should be held responsible only for all direct and proximate consequences, and perhaps for such consequences indirect and remote or incidental as might have been reasonably expected to follow from their construction and maintenance. This we understand to be the extent of the rule; and injuries incidental only to natural occurrences which are so extraordinary, unusual and uncommon that they could not have been reasonably contemplated, anticipated or expected, are *damnum absque injuria*. In application to this case, the doctrine may be stated, that this company would be liable for all damages by flowage back of the waters of the river occasioned by their works, in all such conditions of the river as might have been reasonably anticipated or expected. Such conditions would be not only the natural rise and fall of the waters during the year, but also the floods and freshets which occur annually, or at longer periods or intervals, if regularly, and which from having been known to occur at such periods or intervals might be reasonably expected to occur again. But, on the other hand, if no damages whatever result from these works during the ordinary and usual fluctuations of the river, and the damages complained of resulted from a flood which to the same extent had never occurred but once before, so far as known, and that very long ago, and which might not reasonably have been expected to occur again,

Borchardt vs. The Wausau Boom Co.

and which was so unusual or phenomenal as to excite wonder or surprise, then they cannot be recovered. It is, of course, very difficult to lay down any certain rule by which such occurrences are to be deemed to be so extraordinary and unusual as to exempt the company from liability for their consequences in connection with their works; and such matter may properly be left to the judgment of the jury, under an instruction by the court in which this principle of the law is clearly stated. This principle is of the utmost importance to the existence and purposes of corporations which are created to build and maintain works of internal improvement, in part for the public benefit, by the investment of private capital. All of the ordinary and natural consequences of their works may well have been contemplated and expected, and their ability to meet such consequences and compensate for such damages as would be likely to occur may be ample and constantly maintained; but one extraordinary and unforeseen event, happening from natural causes, against which no provisions or precautions are or could be made, may sweep away in a day or an hour not only all of their profits but their capital, and bankrupt and destroy the corporation itself. It view of such extraordinary risks and hazards, capital would not be likely to seek such an investment, and such enterprises, of great public importance and benefit, would be avoided. But, without further illustration or vindication of the principle, we think there was evidence in this case from which the jury might have found such facts as would have warranted its application, and as required its statement as a matter of law in the instruction asked. This doctrine has been recognized and approved and clearly stated by this court, as well as by other courts, and is made to rest upon the common and familiar rule of damages, that only such can be recovered as do naturally and would ordinarily follow from and are proximate to the cause, or such as might have been contemplated, anticipated or expected to result from such a cause.

Borchardt vs. The Wausau Boom Co.

In *Alexander v. City of Milwaukee*, 16 Wis., 247, this principle was not involved, and the city was held exempt from liability for the flooding of the plaintiff's land by the waves of the lake being driven by winds from the east, but which would not have submerged it if the works had not been constructed, on the ground that the works were built in a lawful and discreet manner by the city, wholly for the public benefit, and in the precise way authorized by the legislature. It may not be necessary to decide the question, but we are inclined to think that a corporation such as this is defined to be in *Cohn v. Wausau Boom Co.*, *supra*, as *quasi* public, and the agent of the state in constructing its works, does not stand upon the same footing with municipal corporations making improvements for the public benefit, as in the above case. The principle here involved is found in the maxim, *causa propinqua non remota spectatur*, and in application to this case it is well stated in the text of Angell, W. C., § 349: "If in the case of the obstruction of a public river it appears that injury resulting therefrom arose from causes which might have been foreseen, such as ordinary periodical freshets, or the collection of ice, he whose superstructure is the immediate cause of the mischief is liable for the damages. On the other hand, if the injury is occasioned by an act of Providence, which could not have been anticipated, no person can be liable." This is the head-note to the case of *Bell v. McClintock*, 9 Watts, 119, closely analogous to this case in the injury of the lands of the plaintiff by flowage caused by the works of the defendant across the river below. The injuries complained of were of two descriptions: those which arose from the ordinary freshets which were of common and periodical occurrence, and those which arose from the extraordinary floods of two certain years. The court below ruled that the defendant was liable for all damages from the ordinary, common and expected floods of the season, but not for those occasioned by the uncommon, unexpected and extraordinary

Borchardt vs. The Wausau Boom Co.

floods. These rulings are approved; and, after stating the true rule of liability for the ordinary freshets or floods which might have been expected with considerable certainty at fixed times and seasons, it is said in the opinion: "But when the injury arises from some cause out of the ordinary course, from some unusual cause — as, for instance, from a flood or freshet such as has been described by the witnesses,— the owner of the dam is not liable. It is *damnum absque injuria*. They are not such accidents as ordinary foresight or prudence could guard against."

In *Sabine v. Johnson*, 35 Wis., 185, "the [circuit] court was asked to instruct the jury that, in determining the plaintiff's right to recover, they were to consider the increased flowage of his land at an ordinary stage of water only, and not the effects of freshets." The court refused so to instruct, and this court affirmed such ruling on the ground that the instruction "does not limit the exemption from liability to the effects of those *unusual and extraordinary freshets* which human sagacity cannot foresee, nor experience foretell;" and cited approvingly the above text from Angell on W. C.

In *Allen v. City of Chippewa Falls*, 52 Wis., 430, the liability of the city is rested on its negligence in not providing means for carrying off the water in times of heavy rains in connection with its other works, and not on the ground of exemption of municipal corporations from liability for injuries to property not taken or directly affected by works of improvement, as in *Alexander v. Milwaukee*, *supra*; and this court, in the opinion of the present chief justice, says: "The duty of providing against an extraordinary rainfall or unusual freshet, such as does not occur but once in a series of years, which persons of ordinary prudence would not think of guarding against, is a burden which ought not to be imposed upon the city."

In *Smith v. Agarwam Canal Co.*, 2 Allen, 355, it was admitted that when the water was unaffected by ice and freshets

Borchardt vs. The Wausau Boom Co.

it did not in any manner affect the plaintiff's mills above, and that on such occasions the water and ice set back upon the plaintiff's premises; and the court says: "From these facts it is a necessary consequence that, if the plaintiff sustained any damage by the rise of water, it must have been owing to the occurrence of freshets and extraordinary floods." For the results of such causes the defendants were held not responsible. The principle seems to be properly expressed, that for damages arising from "forces casual and extraordinary" the parties constructing such works in or across rivers are not responsible. To the same effect are *Inhabitants of China v. Southwick*, 12 Maine, 238; *Monongahela Navigation Co. v. Coon*, 6 Barr, 379; and *Mayor, etc., of N. Y. v. Bailey*, 2 Denio, 433.

In *Gray v. Harris*, 107 Mass., 492, the evidence was that such a flood had occurred once or twice before, but at long intervals, and the court below directed a verdict for the defendant on the ground that such a flood could not have been reasonably anticipated as a matter of law. This ruling was reversed because the question was one of fact upon the evidence, and should have been submitted to the jury, and it is said in the opinion: "It is impossible for us to say judicially, upon this evidence, that this was so great a freshet that the defendant was not bound to anticipate and provide against it."

This principle is distinct from that which exempts municipal corporations from liability for injuries to lands not taken or directly affected by works of improvement constructed solely for the public benefit according to law, and from that which is expressed in *Panton v. Holland*, 17 Johns., 92, "that a possible damage to another in the cautious and prudent exercise of a lawful right is not to be regarded, and if a loss is the consequence it is *damnum absque injuria*."

It is therefore only intended to be decided in this case that, as there was evidence tending to show that the flood and freshet which caused the damages complained of was so unusual and extraordinary that the plaintiffs could not have anticipated or

 Smith vs. Sherry.

expected it, such fact should have been submitted to the jury under an instruction clearly presenting this principle. The instruction asked is not very clearly expressed to present it, but its meaning is sufficiently apparent, and we think the circuit court ought to have given this instruction as asked, or one more clearly expressing the principle intended.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial therein.

 SMITH VS. SHERRY.

December 15, 1881 — January 10, 1882.

RES ADJUDICATA. (1) *What questions previously adjudged herein.*

TOWNS: BOUNDARIES. (2) *Statute as to change of boundaries: in what respects mandatory.*

TAX DEEDS: LIMITATION OF ACTIONS. (3) *Tax deeds, when mere nullities. (3-5) Limitation of actions on tax deeds.*

1. By the decision in a former appeal herein (50 Wis., 210), it was determined that ch. 92 of 1872, annexing certain townships to the village of Shawano, was unconstitutional, and that the lands here in question were not taxable by the authorities of said village. But the question arising on this appeal, whether said lands were taxable by the authorities of the town of Seneca, is not *res adjudicata* by that decision, the parties having omitted, upon the former trial, at the request of the court below, to litigate that question.
2. The statutes (secs. 670, 671, R. S.) prescribing the form in which orders and determinations of a county board for changing the boundaries of towns shall be made, and requiring their publication, are *mandatory*, and must be substantially complied with, to effect such a change.
3. A tax deed, after the expiration of the statutory period of limitation, is conclusive of the regularity of the proceedings upon which it is based, *only in cases where the lands were taxable* by the town or other taxing district whose authorities assumed to levy the tax. In other cases, as where the lands were outside of the jurisdiction of such town or other taxing district, the sale and deed are mere nullities, and do not set the statutes to running.

Smith vs. Sherry.

4. Section 1210e, R. S., was designed merely to limit the time for bringing the equitable action therein mentioned, by the original land-owner, and does not prevent the running in his favor (when he is in possession of the land) of the limitation prescribed by sec. 1210d.
5. To stop the running of the statute of limitations on tax deeds, against the former owner, it is sufficient that he be in actual and open possession for any considerable portion of the statutory period; and upon the facts found in this case (recited below), defendant's possession is held to have been sufficient for that purpose.
- [6. It is an open question in this court, whether a tax-title claimant who has never acquired the actual possession of the land, can recover against the former owner, as damages (under sec. 4269, R. S.), for timber removed by such former owner while the land was in his possession, its highest market value between such removal and the trial.]

APPEAL from the Circuit Court for *Shawano* County.

Action for a trespass to land, and the removal therefrom of pine timber. Plaintiff claimed title to the land under a tax deed from the county of Shawano, based upon a sale for non-payment of taxes assessed upon the land in 1872, by the town of Seneca in said county. The case is further stated in the report of the decision of a former appeal herein, found in 50 Wis., pp. 210-218.

The facts found by the court on the second trial, bearing upon the question of defendant's actual possession of the premises in dispute at any time between the recording of plaintiff's tax deed (April 12, 1877), and the expiration of the statutory period of limitation, were substantially as follows: The lands described in the tax deed, and here in dispute, were the whole of a certain sec. 3, except the east half of the north-west quarter thereof. On the 2d of January, 1877, plaintiff and defendant entered into a contract in writing, by which defendant was to cut and remove, during that year, the pine timber on said excepted half-quarter section, which then was and has ever since been the property of the plaintiff. Soon after the execution of this contract, one Martin, employed by defendant to remove said timber, built shanties on the *south half of the southeast quarter* of said section, and occupied

Smith vs. Sherry.

them with a crew of men until the spring of 1877, as defendant's agent, and made a road from the east half of the northwest quarter of the section, to a point on the river near said shanties, for the purpose of moving the timber from said east half-quarter section, pursuant to the contract just described. Said "Martin road" passed over the south half and northwest quarter of the southeast quarter, and also over the northeast quarter of the southwest quarter of said section 3; and it was convenient to occupy and use said road and also said shanties on the land in dispute, in order to cut and remove the timber from the east half of the northwest quarter. Before Martin vacated said shanties in the spring, he had cut and removed from the east half-quarter just mentioned, a portion of the timber, leaving several hundred thousand feet still thereon; but he did not at that time cut or remove any timber from the land in dispute. After Martin vacated said shanties in the spring of 1877, they remained unoccupied until November 12, 1877. On the 2d of October, 1877, one Davis, the former owner of the land embraced in the tax deed, executed and delivered to defendant a contract of sale of all the pine timber on said land, together with all the timber on forty other forty-acre tracts, by which contract defendant had ten years in which to remove the timber from all of said tracts. Said contract of sale was never recorded; but plaintiff knew of defendant's entry into possession soon after the contract was made, though he did not know of any acts of possession by defendant between March 25 and December 25, 1878. Before March 25, 1878, both defendant and Davis had actual notice of the tax deed to plaintiff and his claim to own the land under it, but they both supposed the deed to be illegal because of a resolution of the county board purporting to cancel it; and no action was commenced by either Davis or the defendant to recover possession of the land or to set aside the tax deed. Prior to the logging season of 1877-8, the defendant and Martin made an arrangement by which defendant

Smith vs. Sherry.

was to remove the timber still remaining on the east half of the northwest quarter of said section [pursuant to Martin's contract with the plaintiff]. Between the 12th and 15th of November, 1877, the defendant, by his agents and servants, went into the shanties above mentioned, for the purpose of cutting and removing said remaining timber of said east half-quarter section, and also the timber embraced in the contract between Davis and the defendant, claiming the right to so enter under his contract with Davis, and not under the plaintiff; and he occupied said shanties for the purpose just mentioned in the winter season, and for agricultural purposes in the spring and summer, until the trial of this action; "but during the season of 1877 and 1878 he cut no timber and made no roads after the 18th of March, 1878, until November, 1878, when he again cut roads, and repaired other roads on the land." During said season of 1877-78, defendant did not cut the remaining timber of plaintiff's east half-quarter section above described. Up to November 12, 1877, no timber was cut on the lands embraced in the tax deed, and they, and the whole township in which they lie, were wholly wild and uncultivated. From about November 12 to December 25, 1877, defendant's agents and servants were engaged in making and repairing logging roads on the land embraced in defendant's contract with Davis, and they made new or repaired old roads (including the "Martin road") on every forty-acre tract in the section. Between November 12, 1877, and March 18, 1878, defendant cut timber (in amounts varying from 5,000 to 300,000 feet) on each, except five, of the fourteen forties included in the tax deed. In the spring of 1878 he also cleared for agricultural purposes about two and a-half acres in the south half of the southeast quarter of the section, in the neighborhood of the shanties above mentioned, and, by his servants, occupied said shanties and clearing during the spring, summer and fall of that year; and from that time until the trial cultivated the cleared land in the summer season, and in

Smith vs. Sherry.

the winter season occupied the shanties for the purpose of lumbering upon the lands in dispute and other lands claimed by him. About November 1, 1878, he went into said shanties, by his servants, for the purpose of cutting the timber on the land described in his contract with Davis, and also the timber on plaintiff's east half-quarter section above described; and he occupied said shanties until the spring of 1879. Between November 1 and December 25, 1878, his servants and agents worked in repairing the "Martin road" and other roads made in 1877, over the lands included in the Davis contract, and also in making new roads through various parts of the section. Between March 25 and December 25, 1878, no timber was cut or removed from any of the lands in dispute, nor any roads worked thereon. During all the times above mentioned, "it was the custom of lumbermen and parties putting in timber to make logging roads and shanties upon wild lands wherever they were wanted for that purpose, without regard to the ownership of the land, and such practice was always acquiesced in without objection by the owners of such lands, and was known to the parties to this action."

Both parties took various exceptions to these findings; but no useful end will be served, apparently, by specifying the exceptions.

Upon the facts found, the court held that before the statute of limitations had run upon the tax deed, in plaintiff's favor, the defendant and those under whom he claims had entered into such possession and occupancy of each forty-acre tract of the premises in dispute, as disengaged the bar of the statute and relieved the defendant from the conclusive effect of the tax deed; and that defendant was entitled to a judgment dismissing the complaint. From the judgment accordingly entered in defendant's favor, the plaintiff appealed.

For the appellant there was a brief by *Hastings & Greene*, and oral argument by *Mr. Greene*.

For the respondent there were separate briefs by *Moses*

Smith vs. Sherry.

Hooper and Finch & Barber, and oral argument by Mr. Hooper and Mr. Barber.

CASSIDAY, J. This case was here upon a former appeal. 50 Wis., 210. It is now urged that it was found on the first trial, and that consequently this court then held, that the lands in question were in the town of Seneca, and hence that such decision is *res adjudicata*. It is true, the court found, on the first trial, that the lands in question were a part of the territory specified in chapter 92, P. & L. Laws of 1872, and that before the passage of that chapter they were a part of the territory of the town of Seneca, and that they were taxed both in Seneca and the village of Shawano, and hence that the deed taken thereon was void by reason of the payment of the taxes levied by the village, and because the lands were not in the village, nor taxable in Seneca. But it appears from a stipulation in the record, signed by the attorneys for the respective parties, and sanctioned by the trial judge, June 29, 1880, reciting the rulings of the court, that the defendant refrained from going into his whole defense at the request of the trial judge, and that if the judgment should be reversed the cause was to be remanded for a new trial, and judgment not to be directed by the court on that appeal. The cause was reversed, and remanded for a new trial, in accordance with the stipulation, and for the reasons therein expressed. 50 Wis., 218. Under these circumstances we must hold that the former decision of this court only went to the extent of holding the act of 1872 unconstitutional, and that under it the village of Shawano had no jurisdiction to levy a tax upon, nor collect a tax from, the lands in question, and hence all other questions were left open for litigation on the second trial. Thus the question litigated upon the first trial was not whether the town of Seneca had jurisdiction to levy and collect the tax from the lands, but whether the village of Shawano had such jurisdiction. The question litigated upon the second trial was not

Smith vs. Sherry.

whether the village of Shawano had jurisdiction to levy and collect the tax from the lands, but whether the town of Seneca had such jurisdiction.

Confessedly the lands, at the time the taxes in question were levied and assessed, were not in the town of Seneca, unless they were attached by an unpublished order of the county board, passed March 29, 1872, and entered in the minutes. Undoubtedly the county board had the power to change the boundaries of towns therein, in case proceedings were had in the manner prescribed in sections 28, 33, ch. 13, R. S. 1858; sections 670, 671, R. S. The statute also prescribed the form in which all such orders and determinations should be carried into effect. Section 29, ch. 13, R. S. 1858, now subd. 11, sec. 670, R. S. The order passed was not in the form prescribed, but substantially different, and attempted to attach one piece of territory to one town and another to another town, on mere motion. The record is this: "On motion of Carl Schmitz, the board of supervisors do order and determine that town 28, range 14, be attached to the town of Herman for town purposes, and that town 28, range 13, be attached to the town of Seneca for town purposes."

The statute also provided that whenever such order or determination was made, the same should be published in some newspaper, and a copy of such publication furnished to each of the town clerks of the county, to be kept by them on file in their respective offices. Sections 30, 31, ch. 13, R. S. 1858; section 674, R. S. It also required that whenever the board organized a new town or altered the boundaries of any town in their county, they should cause a plat and record to be made thereof, by their clerk, specifying the name and boundaries of such town, which plat and record should be kept in the office of such clerk. Section 39, ch. 13, R. S. 1858; section 673, R. S. By a compliance with these several statutory requirements, the respective town officers, and the county officers, as well as the public, would be fully advised of the precise boundaries of every

Smith vs. Sherry.

town, and all confusion, like that in the present case, would be obviated. Such boundaries are essential to the existence of a town. *C. & N. W. Railway Co. v. Town of Oconto*, 50 Wis., 193, 194. The legislative intent was thereby clearly indicated, and the importance of a compliance with these statutory requirements cannot be overestimated. Every citizen is directly interested in knowing the town he lives in. It is liable to enter into the description of every piece of real estate conveyed. Every voter decides for himself, and at his peril, as to the boundary lines of his town. Can it be claimed that the statute as to the form and publication of the order and determination in question are merely directory, thus opening the door for interminable mistakes upon the part not only of citizens, but of town officers? If the attempt to detach territory from one town and add it to another, or to attach more territory to an organized town, is so defective as not to protect the voter or the tax-payer, can it be held that it is nevertheless sufficient to protect and vest title in the tax-title claimant?

It seems to us that the statutes relating to the form and publication of the order and determination are mandatory, and must be substantially complied with in order to effect a change of boundary. It was in effect so held in *Stats v. Pierce*, 35 Wis., 93. In *Clark v. Janesville* it was held by this court that the charter of the city did not go into effect until published, notwithstanding a question under the charter within its terms was, prior to such publication, submitted to the voters and voted upon. 13 Wis., 414; 10 Wis., 135. In *Pettit v. May*, 34 Wis., 674, it was held, in effect, that where a charter requires an ordinance to be published, it is of no effect until publication, and that the defect is not waived by failure to specifically object. See also *Nevada v. Rogers*, 10 Nev., 250; *Antonia v. Gould*, 34 Texas, 49. In view of these adjudications, as well as upon principle, we are clearly of the opinion that the attempt to attach the township in question to the town of Seneca by the unpublished order and determination referred to, was ineffectual to accomplish the purpose.

Smith vs. Sherry.

It is claimed, however, that, conceding this to be true, yet there was not such want of jurisdiction in the tax proceedings prior to the tax deed as to prevent the statute of limitation running in favor of the plaintiff; and a very ingenious and forcible argument is made in support of such claim. The gist of the contention is, that the order of the board gave color of authority to the town of Seneca to assess and levy the tax in question, and that when the deed was issued it became *prima facie* evidence of the regularity of all proceedings, from the valuation by the assessors, inclusive, up to the execution of the deed, and hence the deed was sufficient to set the statute of limitation running. In support of the proposition, counsel rely principally upon *Knox v. Cleveland*, 13 Wis., 245; and *Oconto Co. v. Jerrard*, 46 Wis., 317.

In *Knox v. Cleveland* the attempt was made to show that part of the taxable lands in the district had been "deliberately and intentionally omitted;" but the time prescribed by the statute had already run. In giving the opinion of the court, Dixon, C. J., said: "We are of opinion that the statute put these matters at rest, and that the appellant cannot go into them. It made the deed, in the first instance, *prima facie* evidence of the regularity of all proceedings from the valuation by the assessor, inclusive, up to the execution of the deed. The levy of taxes followed the valuation. The deed was therefore presumptive evidence that the taxes were properly levied. It was like evidence that all taxable property within the district was duly assessed. . . . The statute has closed the door to their investigation." This view is reiterated and pressed with great force, by the late chief justice, in *Oconto Co. v. Jerrard*. But there is an important qualification mentioned in each of those cases, which seems to be peculiarly applicable here. Judge Dixon, in *Knox v. Cleveland*, said: "The general authority of the taxing officers, and the liability of the land to taxation, being conceded, all other questions are at an end. If *either* of them were wanting, another question would be presented. It might then be urged that there was a defect of jurisdiction; that the sale

Smith vs. Sherry.

was altogether unauthorized and void, and passed no title *or color of title*, and furnished nothing upon which the statutory bar could operate." Page 285. This language is quoted with approval by the late chief justice, and he adds that it "suggests the only condition of things to which the statute will not apply—want of authority *ab initio* of the taxing officers to put the taxing power in motion. . . . Property exempt from taxation by law is excepted from all authority to levy taxes, and is as much without the jurisdiction of taxing officers as if it were *without their taxing district* or without the state. A tax cannot attach to it, because it is *not a subject* of taxation. The power of taxation is an attribute of sovereignty, and can be exercised *only* under express authority of the sovereign. Every tax in this state must be expressly authorized by statute. The state acts through its municipalities, and the municipalities act through their officers; . . . and when municipalities or their taxing officers assume to levy a tax or to institute a tax proceeding not authorized by statute, they are outside their functions, and are not acting *virtute officii*. They are not in the exercise of the sovereign power of taxation, and are as powerless to tax as private persons. Their whole proceeding is a mere usurpation, and absolutely void throughout for all purposes. In such a case there is nothing for the statute of limitations to act upon." Pages 327, 323.

Are these expressions applicable to the case before us? As already observed, the court found that March 29, 1872, none of the lands in question were in the town of Seneca. On that day the county board attempted to attach the township within which the lands were situated, to the town of Seneca, for town purposes, by simply adopting a motion to that effect, and entering the same upon their records, but which was never published. Of course, the board were bound to know the law, and that without publication the order was nugatory. This case must therefore be determined the same as it would have been had no such order been made. This being so, can we apply

Smith vs. Sherry.

the qualifying language above quoted to the facts of this case? Can we say that the lands in question were subject to taxation when they were not in the town which attempted to impose the tax? Not being in the town, did taxing officers of the town have authority to put the taxing power of the town in motion as to such lands? Could the town officers get jurisdiction over the lands for the purposes of taxation under the statute, without a substantial compliance with the express conditions of the statute? The lands being without the town, were they still liable to taxation within the town? If the town lines of Seneca did not limit the jurisdiction of the officers of that town to the property therein contained, for the purposes of taxation, then to what lands outside of the town did such jurisdiction not extend? Could such town officers exercise an attribute of sovereign power under the statute not conferred upon them by the statute, nor by any action of the county board under the statute? Does a state act through the town, and the town through its officers, in the imposition of taxes upon any land they may choose, however remote from their territorial limits, or only upon such as are placed within their jurisdiction by apt proceedings under the statute?

If the lands in question were not within the jurisdiction of the town of Seneca for the purposes of taxation, then, most certainly, they were exempt from the imposition of any tax by the officers of the town. Exemption by territorial exclusion would seem to bar the imposition of a tax as effectually as an express statutory exemption. When one town is given jurisdiction to impose taxes upon the lands within its territorial limits, it necessarily excludes every other town from exercising the same jurisdiction within such limits, and this in turn excludes every other town from exercising such jurisdiction over lands outside of its territorial limits. Whenever, therefore, to use the language of the late chief justice, above quoted, the "taxing officers assume to levy a tax or to institute a tax proceeding not authorized by statute [that is, without the taxing

Smith vs. Sherry.

district], they are outside of their functions, and are not acting *virtute officii*. They are not in the exercise of the sovereign power of taxation, and are as powerless to tax as private persons. Their whole proceeding is a mere usurpation, and absolutely void throughout for all purposes. In such a case there is nothing for the statute of limitations to act upon."

The facts in the case before us seem to bring it directly within the rule thus tersely stated. The taxing officers of the town of Seneca being without jurisdiction to impose the tax in question upon these lands outside of the territorial limits of the town, we must hold, in the language of Dixon, C. J., above quoted, "that the sale was altogether unauthorized and void, and passed no title or *color of title*, and furnished nothing upon which the statutory bar could operate." That language was evidently borrowed from the opinion of the court in *McKee v. Lamberton*, 2 Watts & Serg., 114, therewith cited. That case was where seated lands were sold for taxes, and the court said: "The sale of such land is altogether unauthorized and void, and passes no title or *color of title*; it being unseated lands which the act of assembly authorizes to be assessed with taxes and sold for their payment. In respect to seated lands there is no jurisdiction given to the assessors to charge the land itself with a tax, the remedy to recover the taxes being against the owner or the occupier personally. Nor is there any jurisdiction or power in the treasurer to sell such land in any case whatever." That case was followed by *Cranmer v. Hall*, 4 Watts & Serg., 36, where it was held that "a sale of land by the treasurer, which was seated at the time the taxes were assessed, is void, and, upon a recovery of possession by the owner, the purchaser is not entitled to compensation for his improvements. A treasurer's or commissioner's title for unseated land does not confer upon the purchaser a possession upon which he may count in claiming title by the act of limitation."

The decision of this case upon the former appeal is in har-

Smith vs. Sherry.

mony with the conclusion we have reached upon this appeal, and aptly illustrates the soundness of the rule. It was there held that "an uninhabited tract of country, nowhere adjoining an existing village, and in which such existing corporation has no special interest, cannot be made by act of the legislature a part of such village for the mere purpose of increasing the corporate revenues by the exaction of taxes," and that the special act by which such annexation was attempted was unconstitutional and void. 50 Wis., 210. There the village officers, under color of the legislative act, assessed these lands and levied a tax thereon for the same year that the taxes in question were assessed and levied; and the then owner of the land, relying upon the validity of such assessment and levy under such legislative enactment, paid what he probably supposed to be a valid tax upon his land; but the court held, in effect, that, the act being unconstitutional, the proceedings under it were nullities. Here, without any color of legislative authority under a mere unpublished order of the county board, the officers of Seneca assumed to assess these lands and levy the tax in question, notwithstanding they were at the time outside the territorial limits of Seneca, the same as they were in law outside of the territorial limits of the village of Shawano, with this difference, that land-owners and the public generally were more likely to believe, and had much more reason for believing, that the lands were in the jurisdiction which had the legislative and executive sanction, than that they were within a jurisdiction conferred by a mere order of the county board, which, for aught that appears, remained a secret with the members of that body. And, notwithstanding we have held, in effect, that the assessment and levy by the village under the legislative and executive sanction gave no power to collect, and hence that payment to that village was ineffectual to satisfy, yet we are now urged to hold that an assessment and levy under a mere unpublished order of the county board, but without any legislative or executive sanction,

Smith vs. Sherry.

was under such color of authority as to support the tax deed based upon such assessment and levy, and to set the statute running in favor of the holder. But to so hold would, in our opinion, break down and forever destroy the dividing line between jurisdiction and want of jurisdiction in taxing officers. It would be a license to town officers to usurp *extra-territorial* jurisdiction whenever they might desire, and then by the argument of *de facto* authority create from mere waste paper muniments of title under the name of tax deeds, which, supported by a statutory bar, would divest the owner of lands situated in another jurisdiction of all title and possession, even when the tax imposed by the rightful jurisdiction was fully paid. No authority has been cited giving sanction to such a doctrine; and even if there were, we should be slow to follow in a pathway necessarily leading to much confusion, and manifestly beset with great peril and injustice to property owners.

But even if we were disposed to take a different view of the question of jurisdiction, we should feel constrained to hold that the case was correctly decided by the circuit court.

The tax deed in question was issued, dated and recorded April 12, 1877, and based upon sales made and certificates issued in 1873, for alleged taxes on the lands for the year 1872. This action was commenced December 8, 1879, and hence it is claimed that the action is barred by the following statute: "Every action or proceeding for the recovery of lands heretofore sold, or which may hereafter be sold, for the non-payment of taxes heretofore levied, shall be commenced within nine months after the recording of the tax deed, and not thereafter: provided that, in case of tax deeds issued prior to the twenty-fifth day of March, 1878, the action, if not then barred, must be brought within nine months from that day, and not thereafter." Section 1210*d*, R. S. Here the tax deed was issued and recorded prior to March 25, 1878, and if the section is applicable, the plaintiff, by the express limitation of the proviso, could only bring this action "within nine months from that

Smith vs. Sherry.

day, and not thereafter," which time expired December 25, 1878, while the action was not commenced until nearly a year thereafter. Counsel concede that previous statutes in the same language have been held to run in favor of the former owner when in possession during the period of limitation. This concession is undoubtedly supported by authority. *Edgerton v. Bird*, 6 Wis., 527; *Falkner v. Dorman*, 7 Wis., 388; *Knox v. Cleveland*, 13 Wis., 245; *Parish v. Eager*, 15 Wis., 532; *Jones v. Collins*, 16 Wis., 594; *Lewis v. Disher*, 32 Wis., 504; *Wilson v. Henry*, 35 Wis., 241; *Stephenson v. Wilson*, 37 Wis., 482; *Smith v. Ford*, 48 Wis., 161.

It is claimed, however, that the construction which would otherwise be put upon section 1210*d*, if considered by itself, must be restricted to the tax-title claimant by reason of the legislative intent as expressed in section 1210*e*, R. S., which limits the time for bringing actions or proceedings for setting aside or cancelling tax sales, tax certificates or tax deeds, or to restrain the issuing of the same, to nine months. The argument is, that such equitable action or proceeding could not be brought by the former owner unless he was in the actual possession of the land, and hence that the nine months' limitation provided in section 1210*d* could not have been intended to give still further protection in his favor. But the law has for some years been settled the other way. In *Pier v. Fond du Lac*, 38 Wis., 470, it was held that one who has the legal title to land, though not in possession, might, independently of the statute, maintain a suit in equity in the nature of a bill *quia timet* to remove a cloud upon his title. See *Goodell v. Blumer*, 41 Wis., 442.

We are clearly of the opinion that section 1210*e*, R. S., was only intended to limit the time for bringing the equitable actions therein mentioned by the land-owner, but in no way to prevent the running of section 1210*d*, R. S., in his favor when in possession, or against him when, being out of possession, he brings an action or proceeding for the recovery of lands in the

Smith vs. Sherry.

cases therein mentioned; nor does it prevent the running of that section in favor of or against the tax-title claimant in the cases therein mentioned. The limiting of the time within which the former owner may commence the actions designated in section 1210*e* in no way deprives him of the protection against actions by the tax-title claimant given by section 1210*d*, when such owner is in the actual possession. The contention is, that the statute gives the former owner in actual possession no protection, except to establish his title by an equitable action or proceeding brought within the nine months; but, if he fails to bring such action within that time, the tax-title claimant out of possession may, as here, commence his action, not only after nine months, but after twenty months, notwithstanding the section requires that every action to which it is applicable "must be brought within nine months" from March 25, 1878, "and not thereafter." We are clearly of the opinion that such is not the construction to be put upon section 1210*d*, but that the tax-title claimants coming within its provisions were required to bring their actions or proceedings within nine months, as therein prescribed. There are three cases, however, excepted from the provisions of section 1210*d* and section 1210*e* by section 1210*f*, and these, from their nature, were each, we think, for the benefit and protection of the former owner, and neither for the benefit of the tax-title claimant nor to prevent the statute running against him. They are: (1) Where the lands were not liable to taxation; (2) where the taxes on such lands have been paid; (3) where the lands have been redeemed according to law. The last clause of section 1189, R. S., contains similar exceptions. These exceptions were each evidently regarded as fundamental, and going to the very inception and groundwork of the tax proceedings; and hence the provisions that in either of the three cases mentioned the statute should not run against the former owner. And the fact that one of these exceptions is where the lands were not liable to taxation, gives force to our views above expressed on the question of juria-

Smith vs. Sherry.

diction; for, as there stated, lands not situated within the town or taxing district are not liable to taxation in such town or district.

Without referring to the evidence or the findings, we hold that the facts stated clearly show that the defendant was in the actual possession of each of the fourteen forties in question, under the Davis contract, from November 15, 1877, to March 18, 1878, and from November 1, 1878, to December 25, 1878, and thereafter. The character of the possession, as thus stated, would seem to be sufficient. The acts of possession were certainly as demonstrative and public as in some of the cases where this court has held them sufficient to stop the running of the statute against the former owner and bar the tax-title claimant. *Haseltine v. Mosher*, 51 Wis., 443; *Wilson v. Henry*, 40 Wis., 594; *Pepper v. O'Dowd*, 39 Wis., 538; *Stephenson v. Wilson*, 37 Wis., 482; *Wilson v. Henry*, 35 Wis., 241. So we think that the adjudications in this state hold, in effect, that it is unnecessary, in order to stop the running of the statute against the former owner and bar the tax-title claimant, that such former owner should be in the actual possession continuously during the whole period prescribed by the statute; but it is sufficient if he is in such possession for any considerable portion of the time. *Lewis v. Disher*, 32 Wis., 504; *Wilson v. Henry*, 35 Wis., 242; *Stephenson v. Wilson*, 37 Wis., 482; *Haseltine v. Mosher*, 51 Wis., 443.

It was stated on the argument that many members of the bar were under an impression that this court has decided that an action for trespass can be maintained for timber removed, against the former owner, by a tax-title claimant who has never been in the actual possession of the land, and the highest market value of such timber, in whatsoever place, shape or condition the same may be found while in possession of the taker, recovered as damages, under section 4269, R. S. This impression has probably arisen from the inadvertent use of the word "title" in *Webster v. Moe*, 35 Wis., 75, and the

Ketchum vs. Breed.

repetition of the same in *Webber v. Quaro*, 46 Wis., 118, and possibly *Hazelton v. Week*, 49 Wis., 661; but see *Wright v. Co.*, 50 Wis., 167. In *Haseltine v. Mosher*, 51 Wis., 443, the question did not arise. None of the members of the court, however, regard the question as having been determined. Counsel for the appellant do not claim that section 4269 applies to a case in which there is an honest controversy about the title, and concede that, if it did, it would be void, for the reason that it would practically debar the defendant from litigating his title by imposing a penalty if his defense failed. But the questions already determined fully dispose of this appeal. We therefore hold it an open question whether a tax-title claimant, who has never acquired the actual possession of the land, can recover against the former owner, as damages, the highest market value, under section 4269, R. S., for timber removed while in the latter's possession.

By the Court.—The judgment of the circuit court is affirmed.

KETONUM VS. BREED.

December 16, 1881 — January 10, 1882.

Res Adjudicata.

The question of the plaintiff's liability for any deficiency upon a foreclosure sale of mortgaged premises having been put in issue by the complaint and his answer in the foreclosure suit, and determined against him by the judgment, he cannot have that question retried by a suit to restrain the enforcement of that judgment.

APPEAL from the Circuit Court for *Waupaca* County.

The cause was submitted on the brief of *E. Mariner*, as attorney, with *F. M. Hoyt*, of counsel, for the appellant, and that of *G. W. Cate* for the respondent.

COLE, C. J. This is an appeal from an order refusing to dissolve an injunction restraining the defendant, *Breed*, from

Ketchum vs. Breed.

collecting a judgment which he had obtained against the plaintiff and others. The judgment was rendered on the 12th day of February, 1880, for the deficiency in a foreclosure action. At the next term of court the plaintiff moved on affidavits to set aside the judgment and for a new trial, setting forth the reasons why he failed to be present at the trial and make his defense, claiming that he had established a case of excusable neglect under the statute. The motion to set aside the judgment was denied, and on appeal that order was affirmed by this court. 51 Wis., 164. The complaint and accompanying affidavit upon which the injunction was granted, set forth substantially the same facts as those stated in the affidavits used on the motion to set the judgment aside.

The defendant's counsel claims that there is no equity in the complaint, and that this is practically an attempt to retry the former case. We think counsel is clearly correct in that view of the case. All the material matters stated in the complaint as a ground for relief against the judgment were necessarily involved in the former appeal, and were decided adversely to the plaintiff. Therefore, upon well-settled principles, that adjudication is conclusive and binding upon him; he cannot in this manner retry the question whether he was personally liable to pay any deficiency arising on a sale of the mortgaged premises or not. That matter is *res adjudicata*. Among other papers used on the motion to vacate the injunction herein, were the original pleadings, affidavits and proceedings in the former case. And it plainly appears from these papers that one issue made on the complaint and answer of this plaintiff in the foreclosure action was, whether the latter, when he purchased the mortgaged property of Wakefield, agreed and became bound to pay the Rich mortgage as a part of the purchase money. That issue was decided against him. It is true, he moved to set aside the judgment, because, for the reasons stated in his affidavits, he failed to be present and produce his evidence upon the trial. But this court said he showed no sufficient ground for being relieved from the judg-

 Lockhart vs. Geir and another.

ment. Now, if that judgment is not conclusive as to the plaintiff's liability to pay the deficiency arising on the sale of the mortgaged property, it is certainly difficult to see when he will be estopped from litigating that question. We can perceive no equity in the complaint, and the motion to dissolve the injunction should have been granted.

By the Court. — The order of the circuit court, refusing to vacate the injunction, is reversed, and the cause remanded for further proceedings according to law.

 LOCKHART VS. GEIR and another.

December 16, 1881 — January 10, 1882.

LICENSE TO FLOW LAND. (1) *Must be pleaded.* (2) *May be by parol: revoked by suit.*

1. In an action for a trespass to land, if defendant relies upon a license, it must be specially pleaded, and cannot be given in evidence under the general issue; but it is sufficient if the facts constituting the license are averred.
2. A mere license may be by parol, and is a defense as to all acts embraced within its terms, committed before its revocation; but the commencement of an action for damages by the licensor is a revocation.

APPEAL from the Circuit Court for *Dodge County*.

Action under the mill-dam law for past and future damages to plaintiff's land from the flowage thereof caused by defendants' dam. The jury found for the plaintiff; that he was the owner of the land flowed; that he was entitled to recover \$10 from defendants for flowage after the commencement of the action, and fifteen dollars annually for future flowage, or \$200 in gross for the perpetual right to flow. A new trial was refused; and, from a judgment pursuant to the verdict, the defendants appealed.

The errors alleged will sufficiently appear from the opinion.

Lockhart vs. Geir and another.

O. E. Dreutzer, for the appellant.

The cause was submitted for the respondent on the brief of *R. L. Wing*.

COLE, C. J. The principal questions in this case are: Was evidence of a parol license to flow the plaintiff's land admissible under the answer? If so, would proof of such a license defeat a claim for damages prior to the commencement of the action? On the trial, the circuit court, against plaintiff's objection, admitted testimony offered on the part of the defendants which tended to prove that when the defendant *Henry* purchased the water-power and eighty acres of land of the plaintiff, the latter represented that it was a good water-power, having ten or twelve feet head, and would not flow more than twenty or twenty-five acres of the land which *Henry* proposed to purchase; that the land was plaintiff's; and that the defendants would have no trouble with any one on account of flowage. It is now insisted that such evidence was not admissible under the answer, because a license was not specially relied upon or pleaded therein.

Under the former system, license had to be specially pleaded in trespass, and could not be given in evidence under the general issue (1 Chit. Pl., 541); and doubtless the same rule obtains under the code. In this case, however, the answer, while it is informal, substantially sets up a license to flow the plaintiff's land, or what amounts to a license. After setting up the sale of the water-power by the plaintiff to the defendants, and the representations made by the plaintiff as to the height the water could be raised, it is alleged "that after the defendant had built his mill dam and erected his grist mill, he then found that he could get but nine feet head of water, and in getting that it overflowed more land than plaintiff represented it would; that the plaintiff then said that he owned all the land around said mill dam, and that it would be all right; and that the defendant aforesaid would have no trouble."

Lockhart vs. Geir and another.

Now, under this allegation, the defendants might show that they had permission or license to flow the plaintiff's land in the first instance. Certainly it was sufficient to enable them to prove that the plaintiff waived all damages caused by such flowage until the license was revoked; for the facts stated show an express authority to make use of the land for that purpose. Of course, proof of such permission to use the land would not establish a permanent right or privilege to flow (*Hazelton v. Putnam*, 3 Pin., 107; *French v. Owen*, 2 Wis., 250; *Clute v. Carr*, 20 Wis., 532); but it would justify the acts done while the license continued. It seems to us, therefore, that there was no error in admitting the evidence of the parol license under the averments in the answer. The learned counsel for the plaintiff insists that a permanent right to flow land comes within the statute of frauds and must be founded upon a deed or writing, or upon prescription, which supposes one. This is undoubtedly a correct legal proposition; but where nothing beyond a mere license to do a certain act or series of acts upon another's land is contemplated, no interest in land is created. The license has the effect to make an act lawful, which, without it, would be unlawful; and that was the extent of the defense in the case. The evidence given tended only to establish a defense to the claim for damages caused by the flowage while the license continued. It only related to past, not future damages.

Some exceptions were taken to the charge of the court upon the point as to the effect of a parol license. The court, in substance, charged that it was competent and legal for the plaintiff verbally to give his consent that the defendants might build their dam high enough to overflow his land, and if the jury found from the evidence that such consent was given, the plaintiff was not entitled to recover damages for any injury which was caused thereby previous to the commencement of the action. The court also instructed the jury that such parol license or consent was revocable at the pleasure of the plaintiff,

Rusch vs. The Milwaukee, Lake Shore & Western R'y Co.

and that, as there was no proof of any revocation except by the commencement of a suit, this, in law, would be deemed a revocation of such license. We can see no error in this charge of which the plaintiff can justly complain. If the parol license to flow his land was actually given by the plaintiff, it furnished, as we have said, ample justification for that flowage while the license continued; and doubtless the commencement of a suit for damages sustained by the flowage should be treated as a revocation of the license. The plaintiff was allowed to recover for all damages done to the land by the flowage after the commencement of the action. The jury also found what would be a full compensation for all the damage which might thereafter be occasioned by the use of the mill dam, and for the right to maintain the same to the same height it then was. On the whole record we can see no error which should cause a reversal of the judgment.

By the Court.—The judgment of the circuit court is affirmed.

RUSCH VS. THE MILWAUKEE, LAKE SHORE & WESTERN RAILWAY
COMPANY.

December 16, 1881—January 10, 1882.

RAILROADS: CONDEMNATION OF LAND. (1) *Occupying land without paying compensation, a trespass.* (2) *Evidence of land-owner's consent.* (3) *Ineffectual proceedings to condemn.*

1. If a railroad company takes possession of land without the owner's consent, and without having ascertained, under the process given by the statute, and paid the due compensation therefor, it is a trespasser, and liable in an action of trespass.
2. The mere failure of a land-owner to order a railroad company off his land, or to bring his action against it as a trespasser until near the end of the statutory period of limitation, will not operate as a *consent* to its occupation and use of the land.

Rusch vs. The Milwaukee, Lake Shore & Western R'y Co.

3. Several years before the commencement of this action, at the instance of the defendant company, proceedings were had to condemn land, which were regular except that the commissioners awarded a *gross sum* as compensation to all of six lot-owners, who held in severalty (including the plaintiff), without specifying the sum to which each was entitled. The company paid the money into court, and nothing further was done in the proceeding. *Held*, that the condemnation proceedings are ended, and not pending so as to permit the award to be now corrected at the instance of either party; and that they were without any effect upon the rights of the parties.

APPEAL from the Circuit Court for *Outagamie* County.

Action to recover damages for an alleged trespass by the defendant company upon the land of the plaintiff. The trespass charged is the taking and using of a public street on the plaintiff's land, by the defendant, for its railway track. The pleadings, evidence and findings of the court show substantially the following facts: The defendant located its railway along the street in question in 1876, and instituted proceedings in the proper circuit court to condemn the land desired to its use. The land sought to be thus condemned belonged in severalty to six owners. The proceedings were regularly commenced and carried on as required by the statute, except that the commissioners awarded a gross sum as compensation to all such owners, without specifying the sum to which each was entitled. The railway company paid into court the sum so awarded, and nothing further has been done in such proceeding. The company has ever since used the lands thus sought to be condemned, in operating its railway. The plaintiff gave the company no permission thus to use his land, and took no action hostile thereto until he commenced this suit. On these facts the court gave judgment for the plaintiff for nominal damages and costs. The defendant appealed from the judgment.

For the appellant there was a brief by *Cottrill, Cary & Hanson*, and oral argument by *Mr. Hanson*.

Geo. W. Burnell, for the respondent.

Rusch vs. The Milwaukee, Lake Shore & Western R'y Co.

LYON, J. It is not denied that the award of the commissioners in the condemnation proceedings fails to ascertain the compensation to which the plaintiff is entitled for his land which the defendant proposed to condemn to its use. The aggregate sum only to which six owners in severalty were entitled was ascertained, and no rule is given and none exists by which the proportionate share of each can be ascertained. It is settled that, "if a railroad company takes possession of land for which it is liable to make compensation, without the consent of the owner, and without having ascertained and paid the compensation under the process given by the statute, it is a trespasser, and liable in an action of trespass." *Sherman v. M., L. S. & W. Railroad Co.*, 40 Wis., 645, and cases cited. No specific claim is made in the answer that the plaintiff ever consented to the use of his land by the defendant, and the undisputed testimony is that he did not, unless such consent is to be implied from his failure to order the company off his land, or from his delay in bringing this action. We think no consent can properly be presumed from such failure or delay. Speaking no word and doing no act from which consent can reasonably be inferred, he might proceed to recover his damages or land at his leisure, within the limitations of the statute.

The plaintiff's land having been appropriated by the defendants without his consent, and his compensation therefor never having been ascertained and paid, he is entitled to recover in this action, unless (as claimed by the learned counsel for defendant) his right to maintain the action is taken away by the condemnation proceedings. The argument is that the proceedings constitute a suit in court (Laws of 1873, ch. 291, sec. 2); that they are all regular except the failure to award separately the compensation to which each owner in severalty is entitled; that the court had jurisdiction of subject matter and person; and hence, conceding that the award is void, the proceedings are still pending, and the award may be corrected at the

Rusch vs. The Milwaukee, Lake Shore & Western R'y Co.

instance of either party. Under another rule laid down in *Sherman v. Railroad Co.*, *supra*, it is claimed that such pending proceedings are an insuperable barrier in the way of maintaining a common-law action for the trespass.

We do not think the condemnation proceedings are pending, but that the same are determined and at an end. We are aware of no statute which authorizes the circuit court or judge to recall the commissioners and require them to apportion the sum awarded between the owners of the land sought to be condemned, and to amend their award by specifying therein the sum to which each owner is entitled. Such a practice would be like recalling a jury after they have been discharged, and their verdict recorded, to correct their verdict. Indeed, it would be more nearly analogous to recalling the jury for such purpose after judgment has been entered on the verdict, and after the trial term has adjourned. Probably such a practice was never heard of; certainly no such practice can be upheld. We think, and so hold, that the condemnation proceedings are at an end, and that, because they resulted in an award which fixed no rights and bound no one, they have ceased to have any effect for any purpose whatever, and the rights and liabilities of the parties are the same as though the proceedings had not been instituted.

It follows that the plaintiff was entitled to recover, and hence that the judgment of the circuit court should be affirmed.

By the Court.— Judgment affirmed.

Randall and another, Ex'rs, vs. The Northwestern Telegraph Co.

RANDALL and another, Executors, vs. THE NORTHWESTERN
TELEGRAPH COMPANY.

December 17, 1881—January 10, 1882.

NEGLECT: EVIDENCE: ERROR. (1) *Evidence of negligence.* (2) *When principal not bound by agent's admission of negligence.* (3) *Error in admitting evidence, how cured.* (4) *Burden of proof as to contributory negligence.* (5) *Functions of court and jury.* (6) *What negligence of plaintiff will defeat action.* (7) *Error in instructions, how cured.*

ABATEMENT OF ACTION: (8) *By death of party.*

1. In an action for injuries from defendant's negligence in permitting its telegraph wires to be down and lying across a highway at a certain spot, proof that defendant's poles and wire were down at other places, within a few miles of the place of the injury, and at other times, within a few months of the time of the injury, *would seem* to be admissible to show defendant's negligence.
2. An admission by the defendant company's general agent, after the injury was received, that defendant was liable therefor, was not admissible in evidence; and a judgment for plaintiff is reversed for its admission against a sufficient objection to its competency, the court not being able to say that defendant was not injured thereby.
3. A mere instruction to the jury that such admission of the agent was not *conclusive* against the defendant company, was not a sufficient withdrawal of the evidence from the consideration of the jury; and the fact that such instruction was given at defendant's request after its objection to the evidence had been overruled, will not cure the error of the court in admitting the evidence.
4. It is the settled rule in this state, that contributory negligence is purely matter of *defense*, and the burden of proof in relation thereto upon the defendant; and where evidence introduced by the plaintiff tends to show contributory negligence, while defendant may avail himself of such evidence, the burden of proof is not shifted thereby.
5. Upon the evidence in this case, the questions of defendant's negligence and plaintiff's contributory negligence were for the jury, and not for the court.
6. The rule in this state is, that a slight want of ordinary care on plaintiff's part, contributing to the injury, will defeat his recovery, however gross defendant's negligence may have been, provided his act was not wilful and malicious.

Randall and another, Ex'rs, vs. The Northwestern Telegraph Co.

7. A judgment will be reversed for an erroneous instruction, notwithstanding the fact that correct instructions in a contrary sense were also given, where this court is not satisfied that the appellant was not injured by the error.
8. The original plaintiff having died since the trial, and the judgment being reversed, so much of the action as seeks a recovery for injury to his person, has abated; while so much thereof as is for injury to property, and probably so much as is for expenses of medical attendance, etc., survives. R. S., sec. 4253; *Meese v. Fond du Lac*, 48 Wis., 323.

APPEAL from the Circuit Court for *Chippewa* County

The defendant appealed from a judgment in favor of the plaintiff. The case is stated in the opinion.

L. M. Vilas, for the appellant.

For the respondent there was a brief by *Meggett & Teall*, and oral argument by *Mr. Meggett*.

TAYLOR, J. This action was brought by Thomas E. Randall, in his lifetime, to recover damages for an injury occasioned, as he alleges, by the carelessness and negligence of the appellant company in not keeping in proper repair their telegraph line in the county of Chippewa. The complaint avers that, by reason of such carelessness and negligence, the wire of said line became loosened from the poles and fell across a public highway in the town of La Fayette, in said county; and that, while the said Randall was traveling along said highway with his horses and carriage, without any fault on his part, his carriage became entangled in the wire which had so fallen across said highway, and was overturned and damaged, his horses became frightened and unmanageable, and he was thrown from the carriage, and was thereby permanently injured. The complaint also alleges that the appellant company had, previous to the accident, abandoned the use of said telegraph line, and had negligently and wrongfully failed to remove the poles and wire, as required by the statutes in such cases provided. The answer denies any negligence on the part of the company, and alleges that the injury received by the said Randall, his car-

Randall and another, Ex'rs, vs. The Northwestern Telegraph Co.

riage and horses, was caused by his own negligence and carelessness, and not by the carelessness and negligence of the said company, its agents or employees.

The action was tried at great length in the circuit court, and many exceptions were taken to the introduction of evidence on the part of the plaintiff, as well as to the instructions of the court to the jury. The first three exceptions are taken to the introduction of evidence tending to show that the telegraph line of the defendant had been out of repair at other places along the highway, some distance from the place where the plaintiff was injured, and some time before the injury took place. We are not prepared to say that there was any error in admitting this evidence, so far as it was limited to proof of the fact that the wire and poles were down at the times and places mentioned by the witnesses. It was probably inadmissible for the purpose of showing that other persons had suffered injury from the fact of the falling of the poles or wire; but the fact that the poles and wire were down at other places and times within a few miles of the place, and within a few months of the time when the plaintiff was injured, would seem to us competent proof upon the question of the negligence of the company in maintaining the line in a safe condition. A line of telegraph constructed along a highway in such manner that if the wires become loosened from the poles, or the poles become decayed and fall, such highway will be obstructed and rendered dangerous to persons traveling thereon, should be so constructed and maintained as to prevent such occurrences, except when produced by unusual storms or other casualties, which are out of the ordinary course of events. The fact, therefore, that the poles and wires were frequently down and obstructing the highway, although not at the time or place where the accident happened, was competent evidence, tending to establish the negligence of the company in not maintaining a safe line along such highway. The fact that the evidence related to a time a few months be-

Randall and another, Ex'rs, vs. The Northwestern Telegraph Co.

fore the accident, or a place a few miles distant therefrom, would render the proof less conclusive than though it had related to a time a few days before the accident, or a place very near, but it would not affect the competency of the proof.

As we have concluded that the judgment must be reversed because of the error of the court in admitting in evidence the telegram of Haskins to Ginty against the objection of the appellant, and for error in the instructions given to the jury, as hereinafter stated, and because the death of Randall will render the questions raised upon most of the medical testimony immaterial upon a new trial, we have concluded not to consider them upon this appeal.

The plaintiff offered in evidence the following telegram from Mr. Haskins, the superintendent of the appellant company, viz.:

"To Gen. George C. Ginty: Many thanks for your kind words for us to the gentlemen who were hurt by our old wire. I hoped to be with you tomorrow and see them, but I must go home. Have them make a bill and send me. We will pay any reasonable bill. My instructions, if obeyed, would have prevented the accident, but the repair-man neglected his duty, and we must pay the penalty. Answer.

[Signed] "C. H. HASKINS, Gen'l Supt."

This telegram was sent October 20, 1879, and the accident took place August 25, 1879.

The introduction of this evidence was objected to by the appellant upon two grounds: *first*, because it was "secondary evidence, and not the original dispatch;" and *second*, because it was "incompetent, irrelevant and immaterial." The objections were overruled, and the appellant duly excepted. It is clear that this telegram was not a part of the *res gestæ*, and its admission as original evidence against the defendant can only be sustained upon the ground that the admission of the general agent or superintendent of the company bound the company. In the absence of any proof showing that the

Randall and another, Ex'rs, vs. The Northwestern Telegraph Co.

superintendent was authorized by the company to bind it by his admissions, we do not think the court was justified in assuming that he had such power. He was a competent witness for the plaintiff, and, though holding a high position as an agent of the defendant, he was still only an agent, and for the purpose of admitting away the rights of the defendant he cannot be presumed to have all the powers of the corporation.

The inadmissibility of this evidence is fully established by the following cases cited by the learned counsel for the appellant, and upon well-established principles of law: *Mil. & Miss. R. R. Co. v. Finney*, 10 Wis., 388; *Betts v. Farmers' L. & T. Co.*, 21 Wis., 80; *Livesley v. Lasalette*, 28 Wis., 38; *Hazleton v. Union Bank*, 32 Wis., 34; *Richards v. Noyes*, 44 Wis., 609; *Rounsavell v. Pease*, 45 Wis., 506; *Austin v. Austin*, id., 523; *Packet Co. v. Clough*, 20 Wall., 540; 2 Wharton on Ev., §§ 1090, 1174-6; 2 Thompson on Neg., 848, note 7. These cases show that the rank or station of the person making the admission does not affect the question of its admissibility. In *Hazleton v. Union Bank* the admission of the president of the bank was held inadmissible. In *Packet Co. v. Clough* it was held that the admission of the captain of the boat could not be admitted. The authority to make the admission for the principal or corporation is not to be inferred from the position or rank of the party making the same. If such authority is alleged to exist, it must be shown by competent proofs.

It is not strenuously insisted on the part of the learned counsel for the respondent, that the telegram was competent evidence for the plaintiff; but he insists that it should not be held sufficient ground for a reversal of the judgment, *first*, because it was supposed on the trial that the exception was not to the substance of the telegram, but to its secondary nature, not being the original telegram sent. It seems to us very clear that the exceptions cover both grounds; and as we are

Randall and another, Ex'rs, vs. The Northwestern Telegraph Co.

clear the evidence was improperly admitted over the objection to its incompetency, it is unnecessary to determine whether or not the objection taken on the ground of its being secondary evidence was well taken. This evidence was of a character which, if held admissible to bind the defendant, would necessarily have great weight with the jury in the determination of the question of the defendant's negligence; and it would be difficult to cure the error of its admission even by the most clear and positive withdrawal of the same from the consideration of the jury, and a clear direction that they should exclude the same from their consideration, in determining the question of the defendant's negligence.

The learned counsel for the respondent insists that this evidence was withdrawn from the consideration of the jury by the circuit judge in his instructions, at least in part, and that there was so much other evidence given on the part of the plaintiff showing the negligence of the defendant, that this court ought to disregard the error of its admission on the ground that it did not prejudice the defendant. We do not agree with the learned counsel for the respondents that it was withdrawn from the jury. Upon this subject the circuit judge said: "The telegram from the defendant's general superintendent to Ginty, which has been received in evidence, is not conclusive against the defendant; and if you should find from all the evidence in the case that the plaintiff was guilty of such contributory negligence as to prevent a recovery by him under the instructions given you by the court upon that subject, then the defendant is entitled to a verdict in its favor, notwithstanding the expressions in that telegram tending to admit the general liability of the defendant; for the defendant should not be prejudiced by the opinion expressed in such telegram as to the liability of the company, if you find as a matter of fact upon the evidence, and according to the instructions given you by the court, that it was incorrect and erroneous."

Randall and another, Ex'rs, vs. The Northwestern Telegraph Co.

This instruction does not withhold from the consideration of the jury the evidence furnished by the telegram. It simply instructs them that it is not conclusive against the defendant, and leaves it with the jury to give such weight to it as they may think it deserves. Under the instruction the jury were at liberty to consider the evidence of the telegram upon the question of the negligence of the defendant, and also upon the question of the contributory negligence of the plaintiff, and it would naturally have great weight with them upon both questions. That this instruction was given at the request of the counsel for the defendant, does not, we think, cure the difficulty. The evidence had been admitted by the court against the defendant's protest and objection, and we do not think he should be charged with having waived his objections by endeavoring to mitigate its force against him by asking the instruction above quoted. We are unable to say, from our examination of the record, that the evidence of defendant's negligence was so satisfactorily established by the other evidence in the case as would render this entirely immaterial and harmless, and that the verdict must have been the same upon that issue had the telegram been rejected. Much less are we able to say that the evidence upon the issue of the contributory negligence of the plaintiff was so clearly in his favor that the verdict must have been the same upon that issue had the telegram been rejected altogether. Upon both these issues the evidence furnished by the telegram, if admissible, was of a kind which would be likely to be more satisfactory to the jury than almost any other which could have been given. We cannot say, therefore, that the defendant was wholly unprejudiced by its reception; and unless we can say that, in view of the whole case, the judgment must be reversed for that cause alone.

The instructions given to the jury are not as consistent and harmonious as they should be, and this has probably arisen from the fact that most of them were prepared by the counsel

Randall and another, Ex'rs, vs. The Northwestern Telegraph Co.

for the opposite parties, and were given as so prepared. The complaint which the learned counsel for the respondent makes upon the instructions as to the burden of proof on the issue of the plaintiff's contributory negligence, is, we think, unfounded. If there was any want of consistency in the instructions on this point, the defendant was not prejudiced. We think the rule is settled by the court, that contributory negligence on the part of the plaintiff in an action to recover damages for the negligence of the defendant is a pure matter of defense. *Hoyt v. Hudson*, 41 Wis., 105; *M. & C. Railroad Co. v. Hunter*, 11 Wis., 160; *Prideaux v. City of Mineral Point*, 43 Wis., 524; *Bessex v. Railway Co.*, 45 Wis., 477. The plaintiff need not allege in his complaint that he was not himself negligent, nor prove it on the trial. All matters which are purely matters of defense must be alleged and proved by the defendant, and the burden of proving this defense is as much on the defendant as the proof of any other defensive matter. The fact that the plaintiff, in making proofs on his part, introduces evidence tending to prove his own contributory negligence, does not change the nature of the issue. The affirmative of the issue on the question of the plaintiff's negligence, is still with the defendant; and because he may use the evidence introduced by the plaintiff to support his side of that issue, that fact does not shift the burden of proof from the defendant to the plaintiff. If the defendant in an action upon contract pleads payment, and the plaintiff, in making out his case, offers some evidence which tends to prove payment, that fact does not relieve the defendant from the burden of proving the payment. He may make use of the plaintiff's evidence to prove his side of the case, but the burden of the proof is nevertheless on his shoulders. If, in making out his case, the plaintiff should admit his contributory negligence, or prove it by evidence which was conclusive of the fact, he would defeat himself, because he would prove the defendant's defense; but if he only gave testimony which might go to the jury as evidence

Randall and another, Ex'rs, vs. The Northwestern Telegraph Co.

tending to prove such negligence, he would not be bound to give negative evidence to disprove such negligence, or be subject to an instruction that the burden of proof had been changed, so that if it did not affirmatively appear that he had not been guilty of negligence, it would be presumed that he had been.

We are also of the opinion that both the questions of the defendant's negligence and the contributory negligence of the plaintiff were questions for the jury, and not for the court, upon the evidence. And we are inclined to the opinion that the contributory negligence of the plaintiff was a question for the jury under any aspect of the evidence. Taking the statement of the case as made in the letters of the plaintiff introduced in evidence, we are not prepared to say, as a question of law, that the plaintiff was guilty of negligence in crossing the wire under the circumstances declared in such letters. See *Wheeler v. Town of Westport*, 30 Wis., 392-416.

Most of the instructions upon the question of contributory negligence on the part of the plaintiff were sufficiently favorable to the defendant, and, if faulty at all, the fault was in favor of the defendant, except an instruction which was given by the court in the general charge, after the instructions requested by both plaintiff and defendant had been given. This instruction, of which the appellant complains, and to which he duly excepted, reads as follows: "If you find that the plaintiff was guilty of negligence equal to that of the defendant, or that he was negligent in passing over the wires to an extent most men, in their common, prudent travel, under like circumstances, in the exercise of their common judgment, would not have indulged in, you will find for the defendant."

This instruction coming after all the other instructions had been given, and having in substance said to the jury that if they found the plaintiff guilty of the same degree of negligence as the defendant then he could not recover, we think the jury would be justified in inferring that if the plaintiff's

Randall and another, Ex'rs, vs. The Northwestern Telegraph Co.

negligence was not equal in degree to that of the defendant, then he could recover, notwithstanding he was guilty of some negligence; and that even if he did not exercise that care which men of ordinary prudence would have exercised under like circumstances, that would not defeat a recovery. Such a rule of weighing the comparative negligence of the parties has never been adopted in this state. The rule in this state is, that a slight want of ordinary care which contributes to the injury will defeat the plaintiff's action, no matter how gross the negligence on the part of the defendant, unless such negligence be so gross that the court and jury might infer that the act of the defendant was wilful or malicious. *Potter v. Railway Co.*, 21 Wis., 372; *Cunningham v. Lyness*, 22 Wis., 245; *Dreher v. Fitchburg*, id., 675-7; *Ward v. Railway Co.*, 29 Wis., 144-152; *McCandless v. Railway Co.*, 45 Wis., 365-372.

We cannot say that, in a case like the present one, where the question of the contributory negligence of the plaintiff was a most important one in the trial, and where there was considerable evidence tending to prove such negligence, that the defendant was not prejudiced by giving the instruction above quoted, although in other parts of his instructions the court had given the true rule of law upon that question. If the instructions upon the same point are contradictory or conflicting, and some state the law correctly and some incorrectly, this court cannot say that the good ones counterbalance the bad, and therefore no injury is done to either party. We have no way of ascertaining whether the good or bad instructions were adopted by the jury as the rule which should govern them in the case.

For the error in receiving the evidence of the telegram, and in giving the instruction above quoted, the judgment must be reversed.

As it appears from the record that the plaintiff has died since the trial of the action, so much of the action as seeks a

The State ex rel. Moreland and others vs. Whitford.

recovery for injury to the person of the plaintiff, now deceased, has abated. *Meese v. The City of Fond du Lac*, 48 Wis., 323; section 4253, R. S. But we see no reason why the action should not survive for the purpose of recovering damages for the injury to the team and carriage of the plaintiff, and probably for such expenses for medical attendance, nursing, etc., as were necessitated by the injury to his person.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a retrial as to so much of the plaintiff's cause of action as has not abated by his death.

THE STATE ex rel. MORELAND and others vs. WHITFORD.

December 17, 1881 — January 10, 1882.

CERTIORARI: (1) *To quasi-judicial officer: what it brings up for review.*

CONSTITUTIONAL LAW: STATE SUPERINTENDENT. (2) *His power to determine questions relating to division of school districts.* (3) *His power to make rules for hearing such cases.*

1. Where *certiorari* runs to an officer (in this case the superintendent of public instruction), who has only *quasi* judicial power to act in proceedings of a summary character, out of the course of the common law, the record will be reviewed to ascertain not only whether he acted within his jurisdiction, but whether he acted strictly *according to law*; but his decision upon the merits, or upon mere questions of fact as to which there was evidence to support it, will not be reviewed.
2. The statutes imposing upon the state superintendent the duty of determining questions of the division of school districts, on appeal from the decisions of town boards, is valid, the power conferred being only *quasi* judicial. [But to what extent the jurisdiction would be upheld in questions involving grave property and personal rights, it was not necessary to decide in this case.]
3. The superintendent has power to make all needful rules and regulations for the hearing of such cases by him, including a rule requiring the evidence to be submitted in the form of affidavits, and the arguments of parties or their counsel in writing, without a personal hearing or oral examination of witnesses before him.

The State ex rel. Moreland and others vs. Whitford.

CERTIORARI to the state superintendent, to bring up for review his proceedings upon an appeal from the decision of a town board in relation to the division of a school district. The case is sufficiently stated in the opinion.

B. Dunwiddie and B. F. Dunwiddie, for the plaintiffs in error, argued, among other things, that the superintendent, in denying to the parties a personal hearing on the appeal, exceeded his jurisdiction. R. S., sec. 497. The law says he shall hear the appeal, and, in order to do so, he must hear the parties and the subject matter. Not having done so, his order reversing the order of the town board is void. *Joint School District No. 7 v. Wolfe*, 12 Wis., 685. 2. The forming and altering of school districts are not properly part of the supervision of public instruction, but are matters of law. In deciding appeals upon such subjects, the superintendent must construe, interpret and apply the law, and determine questions involving personal rights. The powers thus exercised are judicial in their character, and the statute conferring them is in violation of the state constitution, by which all judicial power is vested in certain courts. Const. of Wis., art. VII, sec. 2; *Attorney General v. McDonald*, 3 Wis., 805; *Gough v. Dorsey*, 27 id., 131; *Van Slyke v. Trempealeau County Far. Mut. F. Ins. Co.*, 39 id., 390; *Wayman v. Southard*, 10 Wheat., 46; *Cooley's Con. Lim.*, 91; *Merrill v. Sherburne*, 1 N. H., 204; *Freeman on Judgments*, 446; *People v. Supervisors*, 10 Cal., 344; 2 Wheat., 309; 13 Md., 91; 35 Me., 15; 46 id., 91; 2 Mich., 411; 18 Ind., 479; *Anderson v. Morris*, 12 Wis., 689. 3. That portion of sec. 497, R. S., which gives to the superintendent power to prescribe the manner of taking and hearing appeals, is in effect a delegation of legislative power, and is therefore void. *Cooley's Con. Lim.*, 116; *Slinger v. Henne-man*, 38 Wis., 505; *State v. O'Neill*, 24 id., 149; *C., W. & Z. Railroad Co. v. Comm'rs of Clinton Co.*, 1 Ohio St., 88. 4. Counsel also criticized the order of the state superintendent upon the merits.

The State ex rel. Moreland and others vs. Whitford.

P. J. Clawson, for defendant in error:

1. The writ properly brings up only the proceedings showing jurisdiction, and the decision of the superintendent; and such decision can be reversed only on the ground of errors and irregularities appearing on the face of the record. The merits will not be reviewed. *State v. Goodwin*, 24 Wis., 286; *People v. Mayor*, 2 Hill, 9; *Roberts v. Warren*, 3 Wis., 736; *Fredrick v. Clark*, 5 id., 191. 2. The return of the superintendent shows that the appeal and the proceedings had thereon were in perfect accord with the requirements of the statute and the rules prescribed by the superintendent respecting appeals, and were all regular and in due form of law. R. S., secs. 412, 418-9, 497; Laws of Wis. relating to Common Schools, 1880. The decision, therefore, is final. 3. The act of the legislature giving the superintendent power to prescribe rules in respect to appeals is not a delegation of legislative power. *In re Griner*, 16 Wis., 423; *In re Oliver*, 17 id., 681; *Spaulding v. Elwood*, 11 id., 17; *Druecker v. Salomon*, 21 id., 628. 4. The law authorizing the superintendent to hear and determine these appeals is not in conflict with the constitution. This power is only *quasi* judicial. *Joint School District No. 7 v. Wolfe*, 12 Wis., 687; *Clapp v. Preston*, 15 Wis., 543; *Lathrop v. Snyder*, 17 id., 110.

ORTON, J. This is a common-law *certiorari* to bring before this court the record and proceedings of the defendant in error, as state superintendent having the supervision of public instruction, in deciding upon the question of the division of school district No. 8 of the town of Clarno, in Green county, upon an appeal from the order of the town board of said town making such division. The question first to be disposed of is, the true province of the writ addressed to such a *quasi* judicial tribunal. In ordinary cases, where the writ goes to inferior courts or tribunals, the record only can be inspected to ascertain whether such court acted within its juris-

The State ex rel. Moreland and others vs. Whitford.

diction; but in respect to an officer having only *quasi* judicial power to act in proceedings of a summary character and out of the course of the common law, the proceedings will be reviewed to also ascertain whether such person, having jurisdiction, has kept within it and acted strictly according to law. To this end, errors or irregularities may be corrected. This we understand to be the effect of the decision of this court in *Milwaukee Iron Co. v. Schubel, Town Clerk, etc.*, 29 Wis., 444.

But the office of this writ, although so enlarged in such cases, will yet not warrant a review of mere questions of fact where there is any contention as to the proof, or the reversal of the judgment or determination of the officer upon the *merits* of the case. Errors of law, and not errors of judgment merely, will be corrected in such a case. In accordance with this view of our jurisdiction in the present case, we may look into the record to ascertain, (1) whether the defendant acted in this matter on appeal within his jurisdiction as state superintendent; (2) whether he acted according to law; and (3) whether he made his determination of the facts upon any evidence which would warrant it. The constitutional question as to whether such a jurisdiction could be constitutionally conferred upon this officer, is virtually disposed of by the above ruling that he is authorized to act only in a *quasi* judicial capacity. If, as the learned counsel of the plaintiff in error contends, he is made by the law a judicial tribunal or inferior court in the ordinary sense, then his jurisdiction only can be inquired into; but it is decided that his functions are only *quasi* judicial, and that is sufficient. *Joint School Dist. No. 7, etc., v. Wolfe*, 12 Wis., 685. In that case, although the question was not directly raised as to the authority of the state superintendent, but only as to a clerk in his office acting in a similar matter, yet it was so vital to the proceeding it must be construed as passed without question, *sub silentio*. The question is directly met and decided as to the superintendent

The State ex rel. Moreland and others vs. Whitford.

of public instruction of the state of New York, whose powers and duties on such appeals are substantially as in this state, and whose determination is final. *People v. Collins*, 34 How., 336. But it is sufficient that the state superintendent, on appeal from the decision of the town board altering or changing the boundaries of a school district, passes upon the matter as an original question, and has the same power and discretion in deciding whether such district should be changed, altered or divided, as the town board had in making its decision. If the state superintendent in this has judicial power conferred upon him in violation of the constitution, so has the town board; and yet no one has thought of questioning the constitutional power of such a body in such a proceeding. The state superintendent is not a court of appeals or of errors, to sit in review of the errors of the town board; but on appeal he acts in the whole matter as the board should have acted, and his decision is final. The legislature might have made the decision of the town board final, if it had seen fit so to do; but it provided for a hearing of the same matter before another officer on appeal, and has made that final.

We think it was eminently proper for the legislature to confer this power of final disposition of changes in school districts on this officer. It is especially within the appropriate functions of his office, and, considering the eminent ability and impartiality of the incumbent of this office in the past, as at the present time, experience has proved that such matters may well be left with him as a finality. To what extent his jurisdiction might be upheld, under the constitution, on questions involving grave property and personal rights, is an important question, which we do not now decide; for in this matter, where his decision maintains the district intact, and its affairs *in statu quo*, no mischief of this sort has been done. But we are satisfied that this supervision of the state superintendent over the affairs of schools and school districts, commonly very fruitful sources of litigation, has been most wisely conferred

The State ex rel. Moreland and others vs. Whitford.

upon him for the public interest, as well as for the peace and prosperity of the schools and districts themselves; and there could be no better vindication of this policy of the state, and no higher commendation of the distinguished gentlemen who have filled the office, than the fact that the decisions of this officer have been so generally and almost uniformly acquiesced in, and the correlative fact that so few cases, placed by the law within his widely-extended jurisdiction, have found their way into the courts.

In respect to the power of the superintendent to make all needful rules and regulations for the hearing of such cases on appeal, we do not understand that it is denied, but only his power to make any rule or regulation by which a *personal* hearing before him of the aggrieved party is denied, and by which the testimony cannot be taken orally as in open court at the time of the hearing. If he cannot exercise the power to make a rule requiring the evidence to be submitted in the form of affidavits, and the arguments of the parties or of their counsel in writing, then it is quite obvious, from the vast number of such and similar cases, his jurisdiction may as well be taken away entirely; for it would be impossible for him to hear personally such matters and appeals within the time fixed by law, if ever during his term of office. We think it was not only clearly within his power to do so, but that the rules for the hearing of such appeals are most judicious and salutary. The law (section 497, R. S.) expressly authorizes him to prescribe the manner of both the taking and hearing of the appeal. The duty of forming and altering school districts is purely municipal, administrative and ministerial, although involving the exercise of judgment and discretion, and has no respect whatever to personal or property rights. This power and discretion are only limited by the districts being required to be of contiguous territory, and not to embrace more than thirty-six square miles of land. Sections 412-418, R. S.

The statute prescribes no rules according to which this duty

The State ex rel. Moreland and others vs. Whitford.

shall be performed, and no method by which any testimony relating to the question may be taken, or way in which the board may become informed as to the advisability or policy of the proposed formation or alteration of its boundaries. The state superintendent, on an appeal from the decision of the board altering a school district, in effect performs the same duty as the town board in respect to it, and exercises the same judgment and discretion; and if the law were silent as to any rules or regulations as to the manner of hearing and deciding upon the advisability or policy of the alteration, he would then be left to any proper manner of informing himself of the facts, and of hearing the parties aggrieved, the same as the town board in the first place. But the legislature, no doubt considering that the superintendent would not have the same facilities for personally obtaining a knowledge of the facts, provided that he might prescribe the manner of hearing as well as of taking the appeal. In this case it seems that he acted in strict accordance with rules adopted and duly published under this authority. It is too apparent to require further discussion that, in the manner of such hearing and of taking the testimony, no personal, common-law or constitutional right has been infringed, any more or in any respect different than in the division of this district by the town board in the first place without any rules. Municipal corporations are necessarily left to prescribe their own rules for doing many things required of them, and they have the inherent right to prescribe such rules as may facilitate the performance of their duties. Cooley on Const. Lim., § 195.

The state superintendent appears to have acted in strict compliance with law and the rules of his department, and there does not appear to have been any constitutional provision violated, either in giving him such a jurisdiction or in his manner of hearing the appeal. It may be well to say here that the use of the word "jurisdiction" in this matter is not strictly proper. It is a *duty* imposed upon the town board,

The State ex rel. Moreland and others vs. Whitford.

and then, on appeal, on the state superintendent, to alter school districts; and the substantial effect of the whole matter is, that town boards may alter school districts only with the approval of the state superintendent, if any party aggrieved appeal to him. Instead of calling it strictly the *hearing of the appeal*, it is his determination of the advisability, propriety or policy of the alteration, on an appeal to him from the decision of the board. When we regard the real nature of the duty to be performed, and are not carried away by words and names of technical meaning, the authorities cited will at once appear inapplicable. "Powers judicial, judiciary powers, and judicatures, are used to designate with clearness that department of government which it was intended should interpret and administer the laws." Cooley on Const. Lim., 92. Jurisdiction, in the meaning of the law, strictly "is the authority or power which a man hath to do justice in causes of complaint brought before him." Jac. Law Dic., tit. "Jurisdiction." "*Judicium* is a proceeding before a 'judex' or judge. Jurisdiction is the power of hearing and determining causes and of doing justice in matters of complaint." Burr. Law Dic.

Under the rule laid down in *Milwaukee Iron Co. v. Schul*, *supra*, we may not look into the evidence any further than to see that there was evidence which warranted the action of the superintendent; but it may be proper to say that this school district, before its alteration, was of compact and square form, of four sections of land, with the school-house in the center, and very nearly central, and conveniently accessible, to the mass of the inhabitants. It would be difficult to find a district better situated geographically, and affording greater advantages and facilities for the attendance of the children at the school. It would seem that the main reasons for the alteration were personal, and that religion and nationality had much to do with it. Such causes of local disturbance ought not to be encouraged by the alteration of civil and geographical

The State ex rel. Moreland and others vs. Whitford.

boundaries suitable to their continued existence, but they should rather be suppressed by fostering a more liberal and generous public sentiment. If school children are found to have feelings of religious or national animosity to the disturbance of the school, they should be kept together, under the same judicious training and instruction, until such feelings are eradicated, before they arrive at mature age and capable of still greater injury to society; and parents may well assist the teacher in efforts so salutary and beneficent, rather than cherish the growth of such roots of bitterness and bigotry. Questions of religion, politics or nativity should not be considered in the formation and alteration of school districts, any more than of towns or counties or congressional districts. "Gerrymander" is the unsavory but expressive name for this method of creating civil divisions of the state for improper reasons. We are inclined to adopt the view of the superintendent that "the principal questions to be considered are material, geographical, statistical and financial," in altering the boundaries of school districts.

The position taken by the learned counsel of the plaintiff in error, that the decision and determination refusing to alter this district, which is brought into this court with the record, is not the decision of the state superintendent, but only of a clerk in his office, is disposed of by the record itself. The return of that officer shows that it was his personal and official action, and the decision is subscribed by him in due form.

By the Court.—The decision of the state superintendent herein is affirmed.

The State ex rel. Priest vs. The Regents of the University of Wisconsin.

THE STATE ex rel. PRIEST vs. THE REGENTS OF THE UNIVERSITY OF WISCONSIN.

December 19, 1881—January 10, 1882.

UNIVERSITY OF WISCONSIN. *Powers of the board of regents in respect to the exaction of fees from students.*

1. The board of regents of the state university, as a corporate body, has no powers except such as are conferred upon it by statute, either by express language or by fair implication.
2. All the acts of the legislature relating to the university, construed together, conclusively establish a legislative intent that, under the general grant of power to make laws for the government of the university, the grant of "all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law," and other like grants in successive statutes defining the functions of the board, it should take the power to exact fees from students, for admission, instruction and the incidental expenses of the university, except as such power was, from time to time, expressly limited.
3. Sec. 338, R. S., which provides that no student who has been a resident of the state for one year next preceding his admission to the state university, shall be required to pay "any fees for tuition" therein, except in the law department and for extra studies, must be construed as prohibiting only fees for instruction, and not charges made to meet incidental expenses.
4. The heating and lighting of public halls and rooms of the university are necessary and convenient for the accomplishment of the objects of the institution; and the general powers granted to the board of regents authorized it to enact the existing by-law, under which there is exacted from each student in attendance a fractional share of the expense of such heating and lighting, as a part of the incidental expenses.

MANDAMUS. The case is thus stated by Mr. Justice CASSODAY:

"This is a demurrer to the return of the president of the board of regents of the university, made for and in behalf of said board, to an alternative writ of *mandamus* issued on the petition of *Edward B. Priest*. It appears, in effect, from the petition and the writ, that the relator, being a member of the

The State ex rel. Priest vs. The Regents of the University of Wisconsin.

senior class of the university, in regular standing, was present with his class from September 7, 1881, to September 19, 1881, when he was excluded by the faculty, or a portion of them, acting under and in pursuance of a resolution adopted in June, 1881, by the board of regents;¹ that he had fully performed all the conditions requisite to entitle him to admission, and all that were required of him, except the payment of four dollars, which sum was charged to him (and all other students except members of the law class) for incidental expenses, and was exacted as a condition of admission, but which he refused to pay, for the reason that such charge was intended to compel resident students of the state to pay tuition under the name and in the guise of incidental expenses, and hence was forbidden by law, and that the board had no right or power to exact the same.

"The return, in effect, admits that the exclusion was upon the sole ground of non-payment of the four dollars charged for incidental expenses, as stated, but denies that the same was in any sense tuition, and insists that the purpose of such charge was to require both resident and non-resident students to contribute, in part, towards the payment for fuel and material to warm and light the public rooms of the university, including rooms for public exercises, literary societies, gymnasium, and the like, for the services of janitors to care for such rooms and students' rooms, and to render occasional personal services to students, and for various other expenditures naturally incident to the conduct of the university, but no part

¹ The resolution was in the following words: "*Resolved*, That henceforth, until further ordered, there shall be collected from each and every student in attendance upon the university, except those in the law department, the following charges for incidental expenses, to wit: four dollars for the fall term, four dollars for the winter term, two dollars for the spring term, payable in advance at the beginning of each term, or at the time of entry of the student therein, in addition to all other fees and charges; provided, that if a student enter after one-half of any term shall have passed, he shall be required to pay but one-half the charges aforesaid, for such term."

The State ex rel. Priest vs. The Regents of the University of Wisconsin.

of which goes for expenditures in the payment of professors, tutors, or the instructional force, or towards the maintenance of the means by which instruction or tuition is given to students; that the total of all the charges imposed by the board in June, 1881, for incidental expenses, on the basis of the attendance of students for the present year or any past year, is not equal to one-half of the amount which the regents will actually expend for fuel and lights for the public rooms of the university, and for incidental expenses of the nature stated; that the whole amount which can be collected from students for incidental expenses for the year 1881-2 cannot exceed the sum of \$3,500, whereas, the amount necessarily expended for fuel alone to heat the several recitation rooms, halls, and other rooms used by and for the students in the manner above mentioned, will exceed \$4,500. These facts, and many others—some of which will be referred to in the opinion,—are all admitted by the demurrer.”

For the demurrer there were briefs by *Olin & Grinde*, as attorneys for the relator, and a separate brief by *S. U. Pinney*, of counsel, and the cause was argued orally by *Mr. Olin* and *Mr. Pinney*.

Wm. F. Vilas, of counsel, for the respondent.

[From the nature of the questions discussed in the elaborate and able briefs in this cause, turning largely upon the construction of legislative acts, it has been found impossible to report the arguments so as to do them even approximate justice in the space which could properly be allowed for that purpose in this volume.]

CASSODAY, J. The educational system of this state had its origin in certain grants of land from the national government, and was secured to the people by our state constitution. Article X. It consists of common or district schools, academies and normal schools, and a state university, with such colleges to be connected therewith from time to time as the interests of

The State ex rel. Priest vs. The Regents of the University of Wisconsin.

education may require. Section 3 of that article requires that such district schools "shall be free and without charge for tuition to all children between the ages of four and twenty years." No restriction as to fees or charges to be paid by students in academies, normal schools, the university, or any of the colleges to be connected therewith, having been imposed by the constitution upon the law-making branch of the government, the state was left perfectly free, and is at liberty to regulate, control, or prohibit altogether such fees and charges by legislative enactment. This will not be denied, for it is a familiar and well-established principle of constitutional law that "the state legislature may exercise all legislative power not delegated to the general government, nor restricted nor reserved to the people by the state or national constitution."

Wis. C. Railroad Co. v. Taylor County, 52 Wis., 37, and cases there cited. Besides, the fact that there is a constitutional restriction in regard to fees and charges for tuition in district schools, but none as to the university or any college connected therewith, pretty clearly evinces an intent to leave the legislature unrestricted, in that regard, as to the university and its colleges. The precise question raised by the demurrer, therefore, is whether the four dollars charged for incidental expenses is authorized by the statute.

Section 388, R. S., provides that "no student who shall have been a resident of the state for one year next preceding his admission, shall be required to pay any fees for tuition in the university, except in the law department and for extra studies. The regents may prescribe rates of tuition for any pupil in the law department, or who shall not have been a resident as aforesaid, and for teaching extra studies." There is no pretense that the charges in question were for extra studies, nor that the relator was in the law department, or not a resident of the state for more than a year next preceding his application for admission. The simple question is, therefore, in the language of the petition, whether the charge exacted was "under the

The State ex rel. Priest vs. The Regents of the University of Wisconsin.

name and in the guise of incidental expenses," but in "fact to pay for tuition." If it was, then the prohibition cannot be doubted. If it was not, then it remains to be seen whether there was authority to make the charge under the statute. Can we hold that "incidental expenses," as defined, are covered by and included in the word "tuition," and hence within the prohibition of the statute?

In determining this question the meaning of the word "tuition" has an important bearing. Not necessarily so much the significance given to it as used and applied to district schools in the constitution, nor as defined at different periods by philologists, but as expressive of the legislative intent in the section of the statute quoted. As an aid in discovering such intent, we may consider the sense in which the word "tuition" had been used by the officers and faculty of the university prior to such legislative enactment; for the legislature must be deemed to have had in view such use when they passed the inhibition in question. It appears that for each year during a period of eighteen years, from 1848 to 1866, the statutes restricted the charge for tuition to a certain amount named, which was varied from time to time by the board of regents. During that period every student was required to pay a certain amount as tuition. With certain exceptions and qualifications, the same was true for the ten succeeding years and down to 1876. In each year for the same period of twenty-eight years, the officers and faculty were accustomed to exact, in addition to such tuition, certain charges under the different names of admission fee, matriculation fee, incidental fee, and charges for fuel, light, etc., for the public rooms and halls of the university. The amount of these charges in the several years, and the names under which the same were exacted, varied from time to time. In the catalogue published in October, 1875, the charges exacted were for tuition, heating and lighting the university hall and public rooms, music, each diploma, and a matriculation fee in the

The State ex rel. Priest vs. The Regents of the University of Wisconsin.

law department. With knowledge of this schedule of charges, as we must assume, the legislature provided that after July 4, 1876, "no student or candidate for admission to the university of Wisconsin, who shall have been a resident of the state of Wisconsin for one year last preceding his application for admission to said university, shall be required to pay any fee for tuition therein; but this provision shall not apply to students taking extra studies (so called), nor to students in the law department." Section 5, ch. 117, Laws of 1876. The substance of this section was reenacted in the Revised Statutes, being section 388 above quoted.

It will be noticed that this prohibition is confined to fees for tuition, but is silent as to the other charges named in the catalogue then regulating the same. Can this silence as to a portion of the charges named in the catalogue, and the express inhibition as to another, be construed as an intent to prohibit the exaction of the charges not mentioned as well as the one expressly named? Can it be fairly held that such silence was by inadvertence or mistake, and not intentional? If so, would the legislature be likely to make the correction, or remain silent, after their attention had been called to the subject? But all the charges (except tuition to resident students) were continued right along, not only after the act of 1876, but until after the present revision of the statutes. Thus we find that, notwithstanding two catalogues were published, containing similar charges to those complained of, after the act of 1876, and prior to the Revision, yet the Revision contained no prohibition against such charges, but only against tuition. A maxim of the law, often quoted, seems, therefore, to be peculiarly applicable: "*Expressio unius est exclusio alterius.*" The long-continued use of the word "tuition" by the officers and faculty of the university, and other similar institutions, as stated in the return, and the legislation had in respect to it, leaves no doubt in the mind of the court that the words of the statute, "no student [except as stated] shall

The State ex rel. Priest vs. The Regents of the University of Wisconsin.

be required to pay any fees for tuition in the university," simply mean that no student shall be required to pay anything for instruction or teaching in the university; and this view is strengthened by the exceptions contained in the section of the statute quoted. For while the prohibition against paying "fees for tuition" is excepted from the law department and for extra studies, it is expressly provided that "*rates of tuition*" may be prescribed "for any pupil in the law department, or who shall not have been a resident, as aforesaid, and for *teaching* extra studies." If the "rates of tuition" thus allowed in the cases excepted from the prohibition were intended to cover "teaching" only, then it is difficult to understand upon what theory of construction "fees for tuition" should not also be restricted to charges for teaching, in contradistinction to the other classes of charges which the officers and the faculty have annually been allowed to exact for a third of a century. We must therefore hold that the statutory prohibition against exacting "fees for tuition," does not include nor reach the incidental expenses for heating and lighting public halls, etc., complained of.

One question remains to be considered: Was the board of regents authorized by the statute to make the charge exacted as incidental expenses? They and their successors in office constitute a body corporate. Section 379, R. S. We agree with counsel for the relator that the board of regents, as a corporate body, has no powers except such as are conferred upon them by statute, either by express language or by fair implication. We agree, also, that the extent of the powers granted must be ascertained from all the provisions of the statute relating to the subject, and that such provisions should be construed in the light of each other, in order the better to comprehend the intention which the legislature had in view. What the legislature said, and the circumstances under which they said it, are of special significance in determining such intent. We agree, also, that the board has no power outside

The State ex rel. Priest vs. The Regents of the University of Wisconsin.

of legislative grant, and by mere usage, custom, convenience, or necessity growing out of a depleted treasury, to exact charges from those in attendance as students. The board is a creature of law, and hence cannot rise above the law, nor be a law unto themselves, in matters outside of the scope of the powers granted to them. But this does not mean that it can do no act except such as is specifically mentioned in the statute. It would be altogether impracticable to prescribe by statute the numerous and varying duties of such a board. Much must necessarily be implied from the character and objects of the corporation, the nature of the trust imposed, and the general powers granted. It will be noticed that the statute in relation to tuition is in the negative form. Prior to 1876 it prohibited the exaction of tuition in excess of the amount named, and after that date it made the prohibition absolute, with certain exceptions, which were in the late Revision put in an affirmative form. It was not so much a grant of power as a restriction upon the exercise of power. The question, therefore, recurs, Did the board have the right and power, prior to the present Revision, to exact any charges whatever not expressly prohibited, and, if so, by what statute was it conferred upon them?

By the act of 1838, No. 99, the government of the university was given to a board of visitors, who, with their successors, were declared to be a body politic and corporate, with perpetual succession, and with power, from time to time, to establish such colleges, academies and schools, depending upon said university, as they might think proper, and as the funds of the corporation might permit. And it was thereby made the duty of the board "to make such by-laws and ordinances, not inconsistent with the laws of the United States or of the territory," as they might judge most expedient for the government of such schools, academies and colleges, or for the accomplishment of the trust thereby reposed; but the act was entirely silent as to charges against students. By the act of

The State ex rel. Priest vs. The Regents of the University of Wisconsin.

July 26, 1848, the government of the university was vested in a board of regents, who, with their successors, were thereby made a body corporate, with the usual powers. It was thereby also made the duty of the board, and it was especially empowered, to enact laws for the government of the university, to elect a chancellor and appoint the requisite number of professors and tutors, and such other officers as they might deem expedient. Section 7. The university was thereby made to consist of four departments. Section 8. The act nowhere in express terms empowered the board to exact charges from any student, but on the contrary such power was assumed to exist, and was thereby expressly limited in the following language: "The fee of admission to the university shall never *exceed* \$10, and the charges for tuition in the *first* and *fourth* departments shall never *exceed* in one year to the residents of the state \$20." Section 10. That section and the whole act were reenacted by chapter 18, R. S. 1849, and again reenacted by chapter 21, R. S. 1858, and continued to be the law of the university until 1866. It is true, this limitation was accompanied by a promise that tuition should be free in those two departments as soon as the income of the university would permit; but this clearly implies that the legislature then understood that tuition was not free in either of those departments, notwithstanding no authority had been given by express words to exact it.

From whence did the board, under those acts, get the right and power to exact tuition in their discretion in the second and third departments, and a limited admission fee in all departments, and a limited tuition fee in the first and fourth departments, unless it was included in the general grant of power already referred to? The board had no right or power, under either of those acts, to impose charges for admission or tuition upon any student in any department, unless it was derived from and included in the general powers therein granted. Why did the legislature, in those enactments, limit the amount of the

The State ex rel. Priest vs. The Regents of the University of Wisconsin.

admission fee and tuition fee in the first and fourth departments, unless they understood that by the same acts they had conferred upon the board the right and authority to exact from students such admission and tuition fees? Was the legislature guilty of the folly of limiting the exercise of a power never granted? The intent to give authority to exact such charges, by the general words employed, is therefore conclusively established by the limitation put upon the exercise of such right by the same legislature which made the general grant of power.

But counsel for the relator insist that while an admission fee was authorized, it was never exacted, but that others which were not authorized were exacted. The difficulty, however, with this theory is, that an "admission fee" was only mentioned in the statute by way of restricting the amount to be charged, and not by way of authorizing such charge, so that the power to impose such charge was not attempted to be given by express words, but only by implication from general words. If there was, therefore, an implied power to exact such charge for the mere admission to the privileges of the university, for a much stronger reason there was an implied power to exact charges for heating and lighting public rooms and halls common to all students, when no restriction has been put upon the exaction of such charges. It is not a question of propriety, but of power. It is not what the regents did do, but what under the statutes they had the power of doing. Their acts of themselves prove nothing, but are significant only as they serve to elucidate the intent with which general words in the statute were employed. The intent of the legislature being thus established, the general grant of power to the board seems to have been sufficiently broad during those eighteen years to include the exaction of charges from students except as expressly limited.

It is true that while chapter 114, Laws of 1866, reorganizing the university, conferred upon the board substantially the same general powers as before, yet the language in regard to

The State ex rel. Priest vs. The Regents of the University of Wisconsin.

an admission fee and rates of tuition are permissive in form, with exceptions, instead of being negatively expressed, as previously; but the change was merely in phraseology, and in no way indicated an absence of belief in the previous existence of the power to exact charges. This view is confirmed by chapter 117, Laws of 1876, which is silent on the subject of admission fee, but simply prohibits fees for tuition to resident students, except in the law department and for extra studies. The power to impose tuition upon non-resident students, students in the law department, and for extra studies, was not derived from that chapter, but existed outside and independent of it. But, as we have shown, the prohibition in this chapter against exacting a tuition fee from resident students in no way trenching upon the right to impose the other charges previously exacted.

Under the Revised Statutes the government of the university is still vested in a board of regents, who, with their successors in office, constitute a body corporate, and are declared to "possess all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law," with power to "enact laws for the government of the university in all its branches." We are to remember that it is not a contract with enumerated details that we are construing, but a charter granting power to "govern" a university, and to "enact laws" for that purpose. These terms are in themselves of sweeping import; but they are accompanied by still others, professing to confer "all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law." This clause is quite similar to the last clause of section 8, art. I, Const. U. S., which gives to congress power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."

It was held at an early day, by the supreme court of the United States, that this clause gave to congress the choice of the means to be employed, provided only that the means selected came within the scope of the constitution and were

The State ex rel. Priest vs. The Regents of the University of Wisconsin.

legitimate to the end sought; and that a national bank was such a means, though not named in the constitution. Opinion by MARSHALL, C. J.: *McCulloch v. Maryland*, 4 Wheat., 411-425. Implied power is an incident of general power granted, and is peculiarly applicable to corporations governed by boards of regents, trustees, directors, and the like. This court has held that, "in determining the powers of a corporation, the rule is, if the means employed are reasonably adapted to the ends for which the corporation was created, they come within its implied powers, though they may not be specifically designated by the act of incorporation;" and that it is "entitled to choose among the means convenient and adapted to the end contemplated by its charter." 5 Wis., 173; *Clark v. Farrington*, 11 Wis., 306; *Blunt v. Walker*, id., 334. By parity of reasoning it may be said, that it is for the board of regents to choose the means which in their judgment are necessary or convenient, provided only they are calculated to accomplish the objects sought by the charter and within the scope of the general powers granted, and not in conflict with the statute. These are some of the general powers conferred upon the board. Sections 378, 379, 381, R. S. Certainly there is no indication here of any purpose to diminish the general powers previously possessed, but rather to increase and broaden them.

Counsel for the relator concede that prior to the legislation of 1876 the regents had the power to charge an admission as well as a tuition fee. But, as we have shown, if such power was implied and then expressly restricted, why is there not the same reason for holding that the power to exact charges for heating and lighting public halls and rooms, under the head of incidental expenses, was also implied, though not restricted. If, therefore, the powers previously existing were broad enough in their scope to include the exaction of the charges made for so many years, except as expressly limited, then there would seem to be no doubt of the right, under the general powers granted, to continue the exaction of the same charges,

The State ex rel. Priest vs. The Regents of the University of Wisconsin.

except in so far as the exercise of such right has been expressly restricted or prohibited. If, prior to 1876, there was a manifest intent on the part of the legislature to clothe the board by general language with power to exact charges for heating and lighting such public rooms and halls as were common to students, as well as fees for tuition, then, did the mere restricting of the right of imposing tuition fees take away the intent to authorize the other charges? If it did, then where shall we fix the dividing line? If there is no power to impose charges upon students for incidental expenses — for heating and lighting public halls and rooms,— then is there any power in the board to rent to students private rooms, or to charge them with the use of chemicals, and the like? But counsel for the relator admit that the regents may charge students rooming in the dormitory room rent, and for heating the same; that they may charge students pursuing the chemical course the cost price of the materials consumed by them in making experiments. But where do they get the power to rent a single room to one, and collect rent therefor, unless it be implied from the general powers granted; and, if so implied, what word or language would include such renting, or the use of such chemicals, or the cost of such materials, and yet exclude the right to charge each student a fractional share of the expense incident to heating and lighting one hall or room for the common use, benefit and convenience of all the students?

Perhaps this discussion has been unnecessarily extended, but the question involved is of some public interest, and we have therefore deemed it to be our duty to pretty fully indicate the views we have taken of the powers conferred by the statutes upon the board of regents in respect to the points involved.

After listening to the able arguments of counsel, and giving the subject very careful consideration, we must conclude from the facts stated in the return, and the reasons given, that the heating and lighting of public halls and rooms of the university is an expense necessary and convenient to accomplish

James vs. Cutler.

the objects mentioned in the statute, and that the general powers granted to the board of regents authorized them to enact the by-law in question, and under it to exact from each student in attendance a fractional share of such expense as incidental expenses.

By the Court.—The demurrer to the return to the alternative writ of *mandamus* is overruled.

JAMES VS. CUTLER.

September 28, 1881—January 16, 1882.

REFORMATION OF DEED. (1) *What facts authorize reformation as for mistake.* (2) *Complaint construed.* (3) *Proof of mistake on plaintiff's part and fraud or mistake on defendant's part.*

APPEAL TO S. C. (4) *When findings of fact by court below reversed.*

1. In the absence of fraud, a conveyance will not be reformed without proof that, previous to its execution, there was a mutual agreement for the sale and purchase of a parcel of land different from that described in the deed, and that the misdescription was inserted by mistake.
2. In an action for reformation of a deed, averments that the description of the premises in the deed "was erroneous, and in fact does not describe the premises purchased by the plaintiff and intended to be conveyed by the defendant, and that such erroneous description was inserted in such deed, and the deed accepted by the plaintiff, by mistake," with further averments stating precisely in what respect the description was erroneous, *held* sufficient allegations that defendant sold and plaintiff purchased the lands alleged to have been omitted from the description in the deed—especially after an answer denying that plaintiff purchased or defendant sold any land other than that described in the conveyance.
3. Where reformation is sought on the ground of mutual *mistake* only, and it appears that the sale was as alleged in the complaint, and that the deed was accepted through a mistake on plaintiff's part, and the evidence received without objection also shows clearly and satisfactorily that the misdescription was inserted *either through mistake or fraud* on defendant's part, the deed should be reformed.
4. Findings of fact by the trial court will not be reversed on appeal except upon a clear preponderance of evidence.

James vs. Cutler.

APPEAL from the Circuit Court for *Waukesha* County.

This action was brought to correct the description in a quit-claim deed of conveyance, executed by the defendant to the plaintiff, purporting to convey to plaintiff certain real estate situate in the village of Waukesha. The complaint alleges that the plaintiff purchased of the defendant a certain parcel of land situated in said village, and described in said complaint as a part of lot 6 in block 1 in Cutler's Addition to said village, for the consideration of \$625, paid to the said defendant therefor; and that, by mistake of both parties, the deed of conveyance was so drawn that the description therein failed to convey to the plaintiff a strip along the south side of the track, intended to be conveyed, five feet and nine inches in width; and it prays that the deed may be reformed so as to include this strip of land.

The defendant denies that there was any mistake in the deed, and alleges that the description contained therein covers all the lands purchased by the plaintiff and sold by the defendant. The cause was tried by the court, and the facts were found as alleged in the complaint, and judgment entered correcting the mistake in the deed. The defendant appealed from the judgment.

For the appellant there was a brief by *J. V. V. Platto* and *W. S. Hawkins*, and oral argument by *Mr. Platto*.

D. H. Sumner, for the respondent.

The following opinion was filed October 18, 1881.

TAYLOR, J. Upon this appeal the learned counsel for the appellant insists, *first*, that the complaint does not set out any cause of action; *second*, that if it does, the proofs failed to show that there was any mistake made in the description inserted in the deed; *third*, that if the respondent believed he was purchasing and paying for the whole tract, including the five feet and nine inches which he alleges was omitted by mistake, and would not have made the purchase had he known he

James vs. Cutler.

was to have only the land described in the deed, there is no proof showing that the appellant intended to sell or convey to the respondent any part of the five feet and nine inches now claimed by the respondent, and that consequently no mutual mistake is shown, and the respondent is not, therefore, entitled to any relief under his complaint.

As to the first error assigned, we think the learned counsel for the appellant is mistaken as to the sufficiency of the facts stated in the complaint. The complaint alleges that the description in the deed "was erroneous, and in fact does not describe the premises purchased by the plaintiff and intended to be conveyed by the defendant, and that such erroneous description was inserted in such deed, and said deed accepted by the plaintiff, by mistake and misapprehension." These allegations we think sufficiently set out the fact that the plaintiff purchased and the defendant sold the lands omitted from the description in the deed, and especially after the defendant has answered denying that any mistake was made in the description inserted in the deed, and denying that the plaintiff purchased or the defendant sold any land other than that described in the conveyance.

The second and third assignments of error present only questions of fact determined by the court below against the appellant. Upon these points this court has frequently held that they will not reverse the findings of the trial court unless the record discloses the fact that the findings are clearly against the preponderance of the evidence. *Ely v. Daily*, 40 Wis., 52; *Hamilton v. Fond du Lac*, id., 50; *Cunningham v. Brown*, 44 Wis., 72, 78; *Monitor Iron Works Co. v. Ketchum*, id., 130; *Drummond v. Huyssen*, 46 Wis., 188. The reason for the rule is stated in the cases cited, and its justice is apparent.

The learned counsel for the appellant does not contend that the evidence does not establish the mistake on the part of the respondent with sufficient clearness to justify the finding of

James vs. Cutler.

the learned circuit judge that he supposed he was buying the strip of land in controversy; but he does insist with great earnestness that there is not sufficient proof to show that the appellant intended to sell, or did sell, to the respondent the strip in question.

It must be admitted that a reformation of a deed or other conveyance of real estate will not be adjudged on the ground of mistake unless the mistake be mutual; that is, in the absence of fraud, a deed will not be reformed, as to its description, unless the evidence shows that previous to the execution thereof there was a mutual agreement to sell on the one part and purchase on the other a parcel of land different from that inserted in the deed, and that such misdescription was inserted by mistake. The proofs show that the tract of land about which the parties were negotiating fronted on Clinton street in said village; that *James*, the plaintiff, at the time, and before the deed was made, owned a part of the same lot 6, fronting on Main street, and that the south end of his lot was bounded by the north line of the land about which they were negotiating; that between the plaintiff's lot and Clinton street there were two other lots, one of which was owned by R. A. Waite, which was covered with a building. The south line of Waite's lot was also part of the north line of the lands about which the parties were negotiating; and on the south side of the tract there was a brick building, fronting on Clinton street, owned by one Morse. This building was built upon land leased to Morse for the term of five years, by the appellant. The proofs show that the space between the north wall of the Morse building and the south line of R. A. Waite's lot and building was thirteen feet and six inches. The land described in the deed is but seven feet and nine inches wide on Clinton street, the south line thereof being five feet and nine inches north of the north wall of the Morse building. Previous to the execution of the deed to *James*, the appellant had sold 25 feet in width off the south end of lot 6 to one August Waite, and he had

James vs. Cutler.

leased 26 feet in width to Morse, next north of Waite's 25 feet, for the term of five years; but the building erected by Morse on the leased land was built on the south side of his lot, so as to leave the north wall of the building five feet and nine inches south of the north line of the leased land, and this five feet and nine inches is the land in controversy. The mistake, if there be one in the deed, grows out of the fact that the starting point in the description is on the west line of lot 6, 51 feet north of the north line of South street (South street being a street which bounds lot 6 on the south), thence running easterly parallel with South street to the east line of lot 6, etc., the other sides being described as the east line of lot 6, the south lines of *James's* and *R. A. Waite's* lots, and (on the west) the east line of Clinton street.

This description excludes all the land leased to Morse, as well as that upon which the building stood. The appellant claims that he did not intend to sell any part of the land leased to Morse, and therefore he started the line at the point where the north line of the lot leased to Morse intersects Clinton street. On the other hand, the respondent claims that he intended to sell all the land north of the north wall of the Morse building, without regard to the description in the lease of the land upon which the Morse building stood. The Morse building was a business building, and not a dwelling-house. The evidence tending to show that the negotiations were about the whole land between the north wall of the Morse building and the south line of *R. A. Waite's* lot, seems to us entirely conclusive. When they first talked about the sale, the appellant stated that he had about 18 feet front on Clinton street; and when respondent told him there was not 18 feet front, the appellant replied that he could not give more than there was. Again, respondent speaking of the whole space between the two buildings as the appellant must have understood, he replied: "You get every inch there is there. I reserve nothing, and you can build on the place as soon as you have a mind to, and

James vs. Cutler.

block that up." The witness, who drew the deed at the request of the appellant, and who heard much of the conversation between the parties, says he understood the bargain was for all the land the appellant owned north of the north wall of the Morse building, and not what was north of the north line of the 26 feet leased to Morse, and that he put the starting point 51 feet north of South street because he knew that 25 feet had been sold to A. Waite, and that he asked appellant "*how much there was in the Morse building, and he replied 26 feet.*" That this man supposed the starting point was the north line of the wall of the Morse building is evident, also, from the fact that before the deed was accepted by the respondent he and the respondent measured the distance between the building of Waite on the north and the north wall of the Morse building, and made it about 15 feet, and he says he told respondent that he could not get any part of the brick building. Again he says, from what he heard the appellant and respondent say about the land sold, he thought it abutted against all the other lots and against the brick building. This evidence, with the additional fact that the appellant at first wished to reserve the right to enter upon the land sold for the purpose of blocking up and raising the walls of the Morse building, if he should afterwards become the owner thereof, if it stood uncontradicted by the testimony of the appellant, would seem to be quite sufficient to justify the finding that it was the intent of the appellant to sell, as well as of the respondent to buy, the whole tract extending south to the north wall of the Morse building.

But it is insisted by the learned counsel for the appellant, that if it be admitted that the appellant knew, at the time he sold to the respondent, that the respondent supposed he was buying and paying for all the land north of the north wall of the Morse building, and even though the evidence shows that the appellant encouraged him in that belief by his statements in regard to the width of the land he had to sell and was selling, and that he gave the person who drew the deed the same impression

James vs. Cutler.

by stating that the Morse building was 26 feet wide, and so misled him as to the starting point, yet the court ought not to find that the appellant intended to convey all the land north of the Morse building, because he testified on the trial that he knew, at the time the deed was made, that the starting point was five feet and nine inches north of such wall, and consequently he was not mistaken as to what was in the deed. We do not think the respondent should be defeated of his action for such reason: *first*, because the learned circuit judge has found against him upon that question as a question of fact; and *second*, because it would not necessarily defeat the respondent's right to relief if it were true. Courts of equity will reform conveyances, *first*, where there is a mutual mistake; and *second*, where there is a mistake by one party, and fraud in the other in taking advantage of it and thus obtaining a contract with the knowledge that the party dealing with him is in error in regard to its terms or its sufficiency to effectuate the real contract made between the parties. *Welles v. Yates*, 44 N. Y., 525; *Bryce v. Lorillard Ins. Co.*, 55 N. Y., 240; *Paine v. Jones*, 75 N. Y., 593; *Whittemore v. Farrington*, 76 N. Y., 452; *De Jarnatt v. Cooper* (Cal.), 13 Cent. Law J., 251; *De Peyster v. Hasbrouck*, 11 N. Y., 582; *Barlow v. Scott*, 24 N. Y., 40; *Rider v. Powell*, 28 N. Y., 310.

The proofs in the case at bar are very satisfactory in establishing the fact that the respondent was negotiating for the purchase of all the lands owned by the defendant in said lot 6 lying north of the north wall of the Morse building, and that when he paid his money and accepted the deed he supposed the deed did in fact convey to him all of said land. It is equally well established by the proofs that the appellant knew, when he delivered the deed to the respondent and took his pay therefor, that the respondent supposed the deed conveyed to him all the lands as above mentioned; and it is also shown that the acts and sayings of the appellant during the negotiations tended strongly to confirm the belief on the part of

James vs. Cutler.

the respondent that the appellant intended to sell him all of said lands. In this state of the proof the respondent was clearly entitled to the relief granted by the court below, either upon the ground of mutual mistake, or upon the ground of mistake on the part of the respondent and fraud on the part of the appellant. The learned circuit judge found that there was a mutual mistake. In this he followed the charity of the law, which will not impute fraud to a party when his acts or sayings can be reasonably interpreted without such imputation. If the evidence of the witness who drew the deed is to be believed, as we think it ought to be, then it would appear that the appellant did in fact intend to convey all the land lying north of the north wall of the Morse building, and that the mistake arose in his giving the width of the building as 26 feet instead of 20 feet and some inches, and that in consequence of such mistake he made the starting point five feet and more too far to the north. If, however, we felt inclined to hold that the evidence does not show any mistake on the part of the appellant, then we should be compelled to hold that there is sufficient evidence to show an intended fraud on the part of the appellant, by reason of which the respondent was induced to accept the deed which he mistakenly supposed conveyed to him all the land north of the Morse building. Taking this view of the case, the learned counsel for the appellant insists that under the allegations of the complaint the respondent should not recover, because fraud was not alleged in the complaint.

The evidence was all received without any objection that it was not admissible under the allegations of the complaint. The court was therefore at liberty to grant any relief asked for in the complaint, whether the plaintiff was entitled to such relief on the ground of mutual mistake or on the ground of mistake on the part of the respondent and fraud on the part of the appellant. See *Dane v. Derber*, 28 Wis., 216; *Mathews v. Terwilliger*, 3 Barb., 50; *Rider v. Powell and Welles v.*

James vs. Cutler.

Yates, supra. In the last case cited the complaint alleged a mutual mistake, yet relief was granted on the ground that there was a mistake on the part of the party seeking relief and fraud on the part of the other party, which entitled the complainant to relief as though there had been a mutual mistake. The case of *Dane v. Derber*, 28 Wis., 218, was similar in its facts and circumstances to the case at bar; and relief was granted upon the ground of mistake on the part of the plaintiff and fraud or mistake on the part of the defendant.

We think the court below would have been justified, under the pleadings and proof, in giving the relief granted upon either of the grounds above stated; and had he given full credence to the evidence of the appellant as to his knowledge of the boundaries of the land as described in the deed, the judgment would have been the same.

We are not unmindful of the rule, well established by this court, that a deed or other written instrument will not be reformed except upon clear and satisfactory proof of mistake or fraud in the execution thereof; but, after a careful examination of the evidence in this case, we think that such mistake on the part of the respondent was clearly established by the testimony, and that on the part of the appellant it also clearly established either mistake or fraud, either of which would uphold the judgment. There is certainly no preponderance of evidence against the findings of the circuit court.

By the Court.—The judgment of the circuit court is affirmed.

A motion for a rehearing was denied January 16, 1882.

Tallman vs. Barnes, imp.

TALLMAN vs. BARNES, imp.

January 10 — February 7, 1882.

PLEADING. (1) *Complaint construed.* (2) *Equitable counterclaim in action for trespass.* (3) *Presumption from pleading.*

TENANTS IN COMMON OF PERSONALTY. (4-6) *Their mutual rights as to possession, and their legal or equitable remedies in case of a forcible taking by one of them.*

1. The complaint herein is held to state a cause of action in trespass *quære clausum*, with allegations of the injury, destruction and carrying away of personal property, in aggravation of damages.
2. In such an action, defendant cannot set up an equitable counterclaim, as owner in common with plaintiff of the personal property injured or taken, to have plaintiff required to account for the use of defendants' share of the property, and to have the property sold and the proceeds divided between the parties; such a claim not arising out of the trespass complained of, nor being connected with the subject of the action.
3. From an averment by defendant that he took possession of the property "peaceably, without unnecessary force," it must be presumed that he took possession by force.
4. One tenant in common of personal property has no right to take possession of the property by force from his cotenant; but, after getting the possession peaceably, he may maintain it by force.
5. One whose pleading shows him to have unlawfully taken from the opposite party by force a part of the property which belongs to them in common, and to be holding the same, will not be heard in equity to ask for equitable relief as to the common property.
- [6. *It seems* that where one of two tenants in common of personalty has forcibly taken possession of the property, the other cannot recover the value of his interest therein in an action of trespass, unless the property has been destroyed.]

APPEAL from the Circuit Court for *Walworth County*.

The complaint alleges that the defendants wrongfully entered upon the premises and into the building of the plaintiff, then occupied and used by him as a printing office, and of which he was then and ever since has been lawfully possessed, and then and there violently assaulted the servants of the plaintiff and used abusive and insulting language to them and prevented them from engaging in the work of the plaintiff,

Tallman vs. Barnes, imp.

and then and there broke up, injured and destroyed the property of the plaintiff and injured his said premises, and then and there wrongfully took and carried away certain described printing material and tools, the property of the plaintiff, of the value of \$1,000, and broke and destroyed the same and converted the same to their own use, and greatly injured the plaintiff's business as publisher and printer, to his damage \$5,000.

The substance of the answer and counterclaim of the defendant *Barnes* sufficiently appears from the opinion. The plaintiff demurred to the counterclaim generally, and also for the reason, among others, that the cause of action stated therein was not pleadable as a counterclaim to the cause of action set out in the complaint. From an order sustaining the demurrer, the defendant *Barnes* appealed.

For the appellant there was a brief by *Fish & Dodge*, and oral argument by *Mr. Fish*. They contended that the facts stated in the counterclaim constitute a cause of action arising out of the transaction set forth in the complaint as the foundation of the plaintiff's claim, or a cause of action connected with the subject of the action, so as to bring it within the provisions of subd. 1, sec. 2656, R. S. By the demurrer it is admitted that the plaintiff and the defendant *Barnes*, as tenants in common, own the personal property mentioned, and that the defendant as such tenant peaceably took said property into his own custody and possession as joint owner, and holds the same subject to the order of the court, and that the property, acts and grievances mentioned in the counterclaim are the same as those mentioned in the complaint. These facts being admitted, the plaintiff's action at law cannot be maintained. *Bulger v. Woods*, 3 Pin., 460. The subject of the plaintiff's action is the material, tools, etc., and the transaction referred to is the taking possession thereof by the defendant. The subject of the action stated in the counterclaim is the same material, tools, etc., and the transactions referred to therein include

Tallman vs. Barnes, imp.

the same transaction mentioned in the complaint. It is no objection to a counterclaim, that the complaint states a cause of action on contract and the counterclaim a cause of action in tort. *Vilas v. Mason*, 25 Wis., 310. And the converse is undoubtedly true. It is no objection to such counterclaim, that the claim in the complaint constitutes a legal cause of action while the cause of action stated in the counterclaim is equitable. R. S., sec. 2657; *Waddell v. Darling*, 51 N. Y., 327; *Akerly v. Vilas*, 21 Wis., 110. To constitute a counterclaim, it is only necessary that the cause of action therein stated, if established, will abridge or defeat the recovery to which the plaintiff would otherwise be entitled. *Dietrich v. Koch*, 35 Wis., 618. And see *G. & H. Manuf'g Co. v. Hall*, 61 N. Y., 226; *Ashley v. Marshall*, 29 id., 494.

For the respondent there was a brief by *Weeks & Steele*, and oral argument by *Mr. Weeks*.

COLE, C. J. In order to determine the sufficiency of the counterclaim it is essential to know what the action is which is stated in the complaint. The counsel for the plaintiff says that the action is trespass *quare clausum*, and that the allegations in respect to the injury, destruction and carrying away of the printing material, and breaking up of the plaintiff's business as printer, etc., are merely in aggravation of damages for the trespass to the realty. We are inclined to think the complaint does set forth such a cause of action, and in what we have to say it will be considered in that light.

In the counterclaim the defendant *Barnes* states, in substance, that he is an owner of an undivided one-fourth of the property constituting the printing establishment, including outstanding accounts and subscription list, having purchased his interest in July, 1875, of one Williams; that the plaintiff is the owner of the other three-fourths; and that the plaintiff has had charge of and collected all moneys arising out of the business since July, 1875, and has used a portion of the funds

Tallman vs. Barnes, imp.

from time to time in purchasing new type and material; but what amount the plaintiff has so used, he is unable to state. He admits that at the time stated in the complaint he, as he lawfully might do, "*peaceably, without unnecessary force, took*" the property in the complaint described into his own custody and control, without doing any unnecessary injury thereto, and holds the same subject to the order of the court. He then asks that the complaint be dismissed; that the plaintiff be required to account for all moneys received by him on the subscription list, and for the use of his one-fourth interest; that the interests of the parties in the property be adjudged and decreed; and that the property be sold, and the proceeds divided according to the interests of the respective parties therein.

It will be seen that the relief asked is purely equitable; and the question is, Will a court of equity entertain jurisdiction to grant it upon the facts stated? It seems to us that it will not. In the first place, treating this as an action of trespass to the realty, the counterclaim would seem improper, for the reason that it neither arises out of that transaction nor is it connected with the subject of the action. The learned counsel for the defendant *Barnes* says that the allegation that Williams, being the owner of an undivided one-fourth of the property in the complaint mentioned, sold the same to his client, etc., shows that *Barnes* was a joint owner or tenant in common of the real estate, the possession of which he invaded. But we do not think the counterclaim should be so understood. It is alleged in the complaint that at the time specified the defendant "wrongfully entered upon the premises and into the building of the plaintiff," of which he was lawfully possessed, etc. The plaintiff could recover whatever damages he sustained by that wrongful act. He might also recover damages for any injury to his premises, if any was done. The counterclaim certainly does not arise out of that transaction, nor is it in any way connected with the subject of that action.

Tallman vs. Barnes, imp.

It is true, it is set forth in the counterclaim that in 1874 Williams, Leland and the plaintiff "purchased the printing-office establishment and property mentioned," and that subsequently Williams sold his interest to the principal defendant herein; but the counterclaim throughout relates to personal property, printing material, type, accounts, etc. — property which it is alleged the plaintiff and defendant owned as tenants in common. It is this property which the court is asked to sell, and divide the proceeds. Now, the defendant avers that he took possession of the personal property which he owns in common with the plaintiff, and holds the same subject to the order of the court. The presumption from the facts stated is, that he took forcible possession; for, while it is alleged that he took the property into his custody "peaceably, without unnecessary force," the plain inference is that he used whatever force was necessary to accomplish his purpose. It is well settled in law that one tenant in common has no right to take personal property from his cotenant by force; but if he can get possession without a resort to force, then he can hold it and protect his possession by force. Coke's Litt., 199*b*. In the counterclaim a court of equity is, in effect, asked to sanction this wrongful taking by the defendant, and give the same relief it would had the possession been lawfully obtained. We do not think a court of equity will exert its jurisdiction on such a state of facts; for it is a maxim of equity that a suitor must come before it with clean hands. It is unnecessary to give illustrations of cases where this maxim has been applied; but the spirit of the maxim is clearly applicable to the counterclaim. The defendant asks a court of equity to take jurisdiction, compel the plaintiff to account for the use of the common property, disclose what money he had collected from the accounts, state what he has done with it, sell the property, and dispose of the proceeds according to the rights of the parties, notwithstanding the admission that he has obtained possession of the property wrongfully, by taking it from his cotenant by force. To grant relief under such circumstances would, as it

Tallman vs. Barnes, imp.

seems to us, violate the principles upon which courts of equity act.

The learned counsel for the defendant argued the case as though it were an action of trespass by one tenant in common against his cotenant for wrongfully taking possession of the common property. We are satisfied that this is not the nature of the suit, and it is quite doubtful if, upon the facts, such an action could be maintained. For Littleton says: "If two be possessed of chattels personal in common by divers titles, as of a horse, an ox, or a cow, and if one take the whole to himself out of the possession of the other, the other hath no remedy but to take this from him who hath done to him the wrong, to occupy, etc., when he can see his time." Coke's Litt., 200a, § 323; *King v. Phillips*, 1 Lans., 421. Where one tenant has destroyed the property of the cotenancy, the action will lie. Freeman on Cotenancy & Par., § 298 et seq., and cases in notes. Also, if the property is susceptible of division, and one tenant claims and holds more than his share, his cotenant, after demand in writing, may sue for and recover his share, or the value thereof, under section 4257, R. S.

It follows, of course, from what has been said, that if the personal property mentioned in the pleadings is owned by the plaintiff and defendant *Barnes* as tenants in common, the plaintiff could not recover the value of his interest in this action, nor do we understand he is attempting to do so. But, to avoid all misapprehension upon the point, we deemed it proper to say this much upon that question; for upon the authorities above cited the law is well settled that one tenant in common cannot recover in trespass against his cotenant the value of his interest, unless the common property has been destroyed. But we are going beyond the question before us, which is, whether the demurrer to the counterclaim should have been sustained. On that point we think the decision of the circuit court was correct, and the order appealed from must be affirmed.

By the Court.—Order affirmed.

Kelly vs. Bliss.

KELLY vs. BLISS.

January 10 — February 7, 1882.

CONTRACTS: RESCISSION: CONSIDERATION. (1) *Rescission of contract by destruction of property.* (2) *Rights of tenant in common of personality, not in possession.* (3) *Consideration for rescission of contract.*

PLEADING. (4-6) *Answering amended complaint. When original answer liberally construed.*

1. If personal property is totally destroyed during the existence of an executory contract for the sale and purchase of an interest therein, this is equivalent to an unqualified rescission of the contract, and the vendee may recover so much of the contract price as has been paid.
2. Where the property was a vessel, and the contract of sale was executed, so that title to the interest sold vested in the vendee, and the vessel was afterwards run by the other owners, and they recovered the damages for her destruction from the person liable therefor, the vendee of such interest was entitled to an accounting by such other owners, of his share in the net proceeds of the use of the vessel and of the net amount of the damages recovered; but he could not recover purchase moneys paid by him.
3. A contract (in this case for the sale of personal property) may be modified and perhaps rescinded without any *new* consideration; and in case of a rescission the release of each party from the obligations of the contract is a sufficient consideration.
4. Where a complaint is amended after answer, new averments will be taken as admitted unless a further answer thereto is made, except where the averments of the first answer are sufficiently broad to meet such new averments.
5. In such a case, where the objection that there is no answer to the new averments of the complaint is first taken in the appellate court, the answer will be construed liberally in favor of the defendant. And in this case, where the answer, after alleging that the sale of the interest named in the complaint was made to defendant's wife, and not to defendant himself, further averred that this was *the only contract* for the sale of any interest in said vessel ever made between plaintiff and defendant, this is held a sufficient denial of a new averment in the amended complaint of a subsequent agreement to rescind the contract of sale and repay the moneys paid thereon.
- [6. A *general denial* pleaded to a complaint cannot operate as a denial of new averments of fact in an amended complaint.]

Kelly vs. Bliss.

APPEAL from the Circuit Court for *Racine* County.

The amended complaint alleges that in February, 1868, the defendant, being the owner of a one-half interest in a vessel known as the *Mechanic*, contracted to sell to the plaintiff one-sixth of his interest therein, or a one-twelfth interest in such vessel, for the consideration of \$675; that the plaintiff paid the defendant \$400 on account of such purchase, at or about the time when the contract was made, and \$50 additional in July following, and it was agreed that the balance of the purchase money should be paid out of the plaintiff's one-twelfth share of the net earnings of the vessel for 1868, if sufficient, and, if that was not sufficient, the plaintiff should pay the deficiency in cash; that plaintiff sailed the vessel as master during the season for navigation of 1868, and no account of her net earnings has ever been rendered to him; that in November, 1868, the vessel was wrecked and destroyed, through the negligence of a certain tug known as the *Margaret*; and that subsequently the owners of the *Mechanic* brought an action in the district court of the United States against the tug *Margaret* and the owners thereof, to recover damages for the destruction of the vessel, and recovered \$14,809.62, one-half of which was paid to the defendant in May, 1877.

It is further alleged that previously to and about the time such action was commenced, "defendant requested plaintiff to aid defendant and the other owners aforesaid of said vessel *Mechanic* in the prosecution of the aforesaid action, and thereupon defendant promised and agreed with plaintiff that if plaintiff would be present and give his testimony therein in behalf of defendant and the other owners aforesaid, and would render such further aid and assistance therein as should be in plaintiff's power, then, in consideration of plaintiff's said services, the defendant would pay to plaintiff the said sum of \$450, and interest thereon, in case defendant and other owners should recover their damages sued for in said action as aforesaid, whenever said damages should be received;" that the

Kelly vs. Bliss.

plaintiff fulfilled such condition on his part; and that, after recovery in the action against the tug, the defendant renewed his promise to pay the \$450 and interest to the plaintiff "whenever defendant should receive his damages sued for as aforesaid."

This action was brought to recover said sum and interest. The original complaint made no mention of the alleged agreement of the defendant to repay the \$450 and interest. With that exception it was very similar to the amended complaint. The defendant answered the original complaint, alleging large expenditures by the defendant on account of the Mechanic, and that no account thereof or of the earnings of the vessel had ever been stated, and that plaintiff had never paid or offered to pay any portion of such expenditures. The answer alleges that the sale by the defendant of a one-twelfth interest in the vessel was to the plaintiff's wife, and not to the plaintiff; and it concludes with the following averment: "Defendant further alleges that the contract for the sale of a one-twelfth interest in said vessel to the said Marcellas S. Kelly, hereinbefore referred to, is the only contract for the sale of any interest in said vessel ever made between plaintiff, either personally or as agent, and defendant, and is the same contract mentioned in the complaint." No further answer was interposed to the amended complaint.

On the trial, the testimony of the plaintiff tended to prove the contract to repay the \$450 and interest, alleged in the amended answer. At the close of the plaintiff's testimony, the counsel for the defendant moved the court as follows: "I move the court for a nonsuit; and let me say that the plaintiff has shown no contract outside of the original to purchase one-twelfth of that vessel; and for this reason: A contract, in order to be a valid contract, and to amount to a contract, must be based on some consideration, and the consideration must be some legal consideration; must be the doing of some act that he was not legally bound to do, or required to do as a

matter of duty that he owed to his copartners." The court granted the motion. Judgment of nonsuit was duly entered, from which the plaintiff appealed.

Edwin White Moore, for appellant.

For the respondent there was a brief by *Fish & Dodge*, and oral argument by *Mr. Fish*.

LYON, J. The theory of the original complaint was, that the contract between the parties for the purchase and sale of a one-twelfth interest in the vessel was purely executory; that no title passed to the plaintiff, and hence the vessel was at the risk of the defendant until the contract should be executed by an actual transfer of such interest to the plaintiff. If that theory is correct, the destruction of the vessel while the contract remained executory would incapacitate the defendant from conveying the agreed interest to the plaintiff, and there would be a total failure of consideration. It would be equivalent to an unqualified rescission of the contract, and the plaintiff could recover the sums he had paid on account thereof.

The theory of the answer seems to be, that, if there was any contract between the parties in respect to a sale of an interest in the vessel, it was so far executed as to vest in the plaintiff the title to a one-twelfth interest therein. In that case it is quite obvious that, in the absence of any subsequent agreement, and under the circumstances of this case, the plaintiff could not maintain an action of *assumpsit* to recover back the money he had paid on account of his purchase. His remedy would be for an accounting between the owners, of the earnings of the vessel and the expenses and proceeds of the action against the tug; and he could only recover his proportionate share of the net earnings, and of the net balance realized on the judgment in such action. These remarks go upon the hypothesis that there was a total loss of the vessel. If there was not a total loss, then the cost of repairing or re-

Kelly vs. Bliss.

building the vessel (she having been rebuilt) may become an element in the accounting.

Without discussing the proposition, it is sufficient to say that we think the testimony of the plaintiff shows that the original agreement was so far executed that the title to one-twelfth of the vessel passed to and was in the defendant.

In his amended answer the plaintiff changed or rather enlarged the grounds of his action. He therein seeks to recover on the subsequent conditional agreement of the defendant to repay the money received by him on account of the original purchase by the plaintiff of an interest in the vessel. The validity of this agreement is attacked on the ground that it is unsupported by any legal consideration. This presupposes that some new consideration, moving between the parties, is essential to the validity of the agreement; but we think the law is otherwise. We take it to be well settled that the parties to a contract may, by mutual agreement, vary or modify its terms, or rescind it, without any new consideration therefor. In the case of a modification or change of a contract, the consideration for the original agreement is imported into the new agreement which is substituted for it. Per Lord DENMAN, in *Stead v. Dawber*, 10 Ad. & El., 57; *Brown v. Everhard*, 52 Wis., 205. See also *Goss v. Lord Nugent*, 5 Barn. & Ad., 58. No good reason is perceived why the same principle does not apply to the rescission of a contract. But if it does not, the result is the same. In the case of rescission each party is released thereby from the obligations of the rescinded contract. This would seem to furnish a sufficient new consideration, if one is essential to the validity of the agreement to rescind.

In *Wells v. Millet*, 23 Wis., 64, specific performance of a contract was refused for the reason, amongst others, that the parties had mutually agreed to rescind such contract. There is no discussion in that case of the question under consideration, neither is there any suggestion of a new and independent consideration, or that one is essential to the validity of the rescission.

Kelly vs. Bliss.

The conditional contract alleged in the amended complaint, the conditions having been fulfilled, was, in substance and effect, a rescission of the original contract, and left the parties in the same position as though the plaintiff had never purchased an interest in the vessel. It relieved the plaintiff from any liability as part owner, incurred on account of the vessel, to the defendant, and the defendant from all liability to account to the plaintiff for her earnings, or the proceeds of the suit received by him. The conditions, to wit, recovery against the tug and her owners, and collection of the damages, were fulfilled, and the contract to repay the \$450 to the plaintiff thereby became absolute. Within the rules above stated, we must hold that the contract alleged in the amended complaint is valid, and, if made, is ground for maintaining this action; and because the testimony tends to show that the parties made such contract, it was error to nonsuit the plaintiff.

The defendant did not interpose an answer to the amended complaint, but stood upon his answer to the original complaint. It is claimed that those allegations of the amended complaint which are not also contained in the original, stand admitted for want of an answer. Doubtless the defendant may, if an amended complaint be interposed, stand upon his answer to the original complaint, and it will be effectual as to all averments common to both complaints. It may also be sufficiently broad to reach new averments. But if it is not, such new averments will be taken as admitted, unless a further answer thereto is made. In this case we think the averment in the answer that the contract stated in the original complaint is the only contract for the sale of any interest in the vessel ever made between the parties, is sufficiently broad to reach the new averments in the amended complaint, and should be regarded as a denial thereof. This may be a somewhat liberal construction of the answer in favor of the defendant; but in view of the fact that the objection is first made in this court, the defendant is entitled to a more liberal construction of his pleading than would be given to it had the ob-

 Boyd vs. Beaudin and another.

jection been taken earlier. See *Hazleton v. Union Bank*, 32 Wis., 34, and cases there cited. Regarding the alleged rescission of the original contract as substantially a purchase by the defendant of the one-twelfth interest in the vessel which he theretofore sold to the plaintiff, the denial in the answer is a denial of the alleged rescission. To avoid misapprehension, it should be remarked, however, that we do not think a general denial pleaded to a complaint can operate as a denial of new averments of fact in an amended complaint.

The judgment of the circuit court must be reversed, and the cause will be remanded for a new trial.

By the Court.— So ordered.

 BOYD vs. BEAUDIN and another.

January 10 — February 7, 1882.

PRACTICE: COUNTERCLAIM: JUDGMENT. (1) *Rights of each of several defendants to several counterclaim and judgment.*

EQUITY: REDEMPTION. (2) *When action to redeem proper remedy.* (3, 4) *How far a tender necessary before action to redeem.* (5) *Counterclaim for redemption, etc.* (6) *Parties defendant in action to redeem.* (7, 8) *Rights of mortgagee as to purchasing at mortgage sale.*

PLEADING. (9) *Misjoinder of plaintiffs no ground of demurrer.*

1. In an action on a promissory note, against both the maker and the indorser, a separate judgment may be rendered between the plaintiff and each of such defendants, and either of the defendants may plead a counterclaim solely in his own favor.
2. In general, where the mortgagee of chattels has taken possession, and the mortgagor's legal rights have been forfeited by a breach, his remedy is by an action to redeem.
3. Where a chattel mortgagee has realized moneys from the use of the property and has unlawfully sold part of it, the mortgagor may sue in equity to charge him with the moneys thus realized, and to redeem the unsold part on payment of any sum which may be found due on the mortgage.

VOL. LIV — 13

Boyd vs. Beaudin and another.

debt upon an accounting; and where an accounting by the mortgagee is necessary to determine the amount so due, no tender of the amount is necessary before bringing the action to redeem.

4. The want of a tender of the balance due, before the commencement of an action to redeem, will not defeat the action, but affects only the costs.
5. In an action on a note given for the price of an interest in a chattel, secured by mortgage thereof, the defendant may set up an *equitable counterclaim* for an accounting by plaintiff as to moneys realized by him from the use or unlawful sale of the property, and for a redemption on payment of any balance found due.
6. The purchaser of an interest in the mortgaged chattels at such unlawful sale, is not a necessary or proper party to such action for an accounting and to redeem, where no relief is sought against his claim of title to such interest.
7. Whether a chattel mortgagee may in any case become the purchaser at a public sale under the mortgage, so as to cut off the equity of redemption in the mortgagor, is not here determined.
8. When the mortgagee makes the sale without the knowledge of the mortgagor, in violation of an agreement or understanding between them, and purchases himself, at a grossly inadequate price, and renders no account of the sale to the mortgagor, the sale will be avoided at the suit of the latter.
9. The joinder of a party as plaintiff who has no interest, is not ground of demurrer.

APPEAL from the Circuit Court for *Racine* County.

The case is thus stated by Mr. Justice TAYLOR:

"This action was brought to recover the amount alleged to be due upon two promissory notes made by the defendant *Beaudin* as principal, and indorsed by the defendant *Roissy*, payable to the plaintiff, dated April 23, 1879; payable, one on September 10, 1879, and the other on July 10, 1880. It is alleged in the complaint that the notes were given in part payment for a vessel known as the *Josephine*, sold by the plaintiff to the defendant *Beaudin*. The complaint states facts sufficient to charge the defendant *Roissy* as indorser of the notes, and demands judgment against both the defendants for the amount due upon them. The defendants do not deny any of the allegations of the complaint, but set up an equitable counterclaim, in substance, that the notes were given in part

Boyd vs. Beaudin and another.

payment for the vessel Josephine, as alleged in the complaint; that the defendant *Roissy* had no interest in the vessel purchased; that he indorsed the notes for the mere accommodation of *Beaudin*, and that *Beaudin* paid in cash \$150 for said vessel, in addition to said two notes; that the two notes were secured by a chattel mortgage upon the Josephine, given by *Beaudin* to the respondent; that immediately after the purchase *Beaudin* expended \$25 in fitting up the vessel for sailing, and sailed her during the summer of 1879; that he was unable to make payment of the note which became due September 10, 1879, and on November 18, 1879, the vessel was tied up at the port of Kenosha for the winter, and was then free from all debt except the mortgage debt; that about November 25, 1879, the plaintiff had an interview with the defendants at Kenosha, and it was then agreed between the defendants and the plaintiff that the defendants should surrender to the plaintiff all claim to said vessel, her tackle, apparel and furniture, and that in consideration thereof the said plaintiff should deliver up and cancel the two promissory notes in suit; that such agreement was not then consummated, but at plaintiff's request was to be closed up by the delivery of the vessel, etc., and the cancellation of said notes at some future day, and before navigation opened for the next ensuing season, — the plaintiff stating, as a reason for not closing the matter then, that he had not the notes with him.

“It is then alleged that on January 29, 1880, the plaintiff, in total disregard of his agreement, and without any notice of any kind to either of the defendants, sold the said vessel at public vendue in the said city of Kenosha, for the nominal price of \$50, and, as defendants verily believe, the plaintiff purchased the vessel at said sale, paying therefor only the sum of \$10; that at the time of such sale said vessel was well worth the sum of \$350; that on June 19, 1880, the plaintiff sold the undivided half interest in said vessel to John Kane and Henry C. Kane for \$175, and now claims to be the owner of the other undivided one-half thereof.

Boyd vs. Beaudin and another.

"It is then alleged that said sale was made in fraud of the rights of the defendants, and for a grossly inadequate price, and that no credit was given by the plaintiff upon either of said notes for the money realized by him upon the pretended sale under said mortgage; and as relief defendants pray that an account may be taken between the parties; that the plaintiff be credited with the amount due upon said notes, and be charged with the sum of \$175, realized by him from the sale of the undivided half interest in said vessel to the said Kanes; that if on such accounting anything shall be found due the plaintiff, the defendants may be allowed, by paying the same into court, to redeem the undivided one-half of said vessel now claimed to be owned by said plaintiff, and that he be compelled to deed the same to these defendants, or to the defendant *Beaudin*, and if the plaintiff shall not make good the title to said undivided one-half interest in said vessel, then they shall have judgment for the value thereof, or for a decree satisfying and canceling said notes, and for such other relief as may be agreeable to equity.

"To this counterclaim the respondent demurred, (1) because the court had no jurisdiction of the subject matter of the counterclaim; (2) because there is a defect of parties, as it appears that the said John Kane and Henry C. Kane should be parties to an action to redeem from the mortgage, and because it appears that the defendant *Roissy* has no interest in the subject of the counterclaim; (3) because the facts stated are not sufficient to constitute a counterclaim; (4) because it appears on the face thereof that the alleged cause of action stated is not pleadable as a counterclaim. The demurrer was sustained, and the defendants appealed from the order."

For the appellant there was a brief by *Fish & Dodge*, and oral argument by *Mr. Fish*.

For the respondent there was a brief by *Markham & Noyes*, and oral argument by *Mr. Noyes*:

1. The facts pleaded, if sufficient for any purpose, could be set up by way of defense to the action at law, and hence the

Boyd vs. Beaudin and another.

equitable counterclaim is demurrable. *Pennoyer v. Allen*, 50 Wis., 308; *S. C.*, 51 id., 360; *Resch v. Senn*, 31 id., 138. The right to redeem is based upon the agreement alleged. Such agreement, if made and consummated, would be a defense which could be interposed at law, if available for any purpose. Moreover, after default, and even after possession taken by the mortgagee, the mortgagor could maintain an action to reinvest him with title, upon due tender of the debt and costs. Herman on Chat. Mortg., 468-9, § 196; *Smith v. Phillips*, 47 Wis., 202; *Musgat v. Pumpelly*, 46 id., 660. 2. The defendants cannot ratify the plaintiff's sale to the Kanes without also ratifying the sale or proceedings by which he acquired possession and title to the property so sold. If not ratified, the Kanes are necessary parties to any action affecting the possession or title to the vessel. The defendant *Roissy* has no interest in, and is not a proper party to, the alleged counterclaim. It cannot, therefore, be interposed in this suit. *Pennoyer v. Allen*, *supra*; *McConihe v. Hollister*, 19 Wis., 269; *Dolph v. Rice*, 21 id., 590. 3. The counterclaim states no cause of action. It is alleged that the plaintiff took possession after default, and sold the vessel, under the terms of the mortgage. The terms and conditions of the mortgage are not given, and it must be presumed, therefore, that they were strictly and fully complied with. It does not appear but that, by the terms of the mortgage, the proceedings alleged were in exact accordance with the agreement of the parties, and that pursuant thereto all right of redemption was to be waived or cut off. The court cannot say that the mortgagor has been deprived of any of his rights, or that any fraud or even mistake has been committed by the plaintiff. The bare assertion of fraud and inadequacy of price upon the sale goes for naught, in the absence of a statement of facts tending to substantiate such assertion. The notes secured by the mortgage remain unpaid. The only sum claimed to have been realized to the plaintiff is \$175. The amount due on the notes is \$200

Boyd vs. Beaudin and another.

and interest. A tender of the balance must be alleged and shown, before a suit to redeem can be maintained. Herman on Chat. Mortg., 469-472; Jones on Chat. Mortg., § 690; *Hall v. Ditson*, 55 How. Pr., 19; *Halstead v. Swartz*, 46 id., 289.

TAYLOR, J. We see no reason why the court has not jurisdiction of the subject matter of this counterclaim. It may be that when a mortgagor seeks to redeem from a chattel mortgage, and recover the possession of the mortgaged property from the mortgagee in possession, he can accomplish the purpose in an action at law by first tendering the amount due on the mortgage, and bringing his action of replevin to recover the possession of the property. But this is not an adequate remedy when any part of the mortgaged property has been destroyed or unlawfully sold by the mortgagee. In such case the mortgagor has the right to charge the mortgagee with the value of the property sold, or he may waive that right and charge him with the moneys realized by him on such sale; and, when the mortgagee has used the mortgaged property, and realized money from such use, he may be charged with the moneys so realized. The general rule is, that when the mortgage is forfeited, and the mortgagee takes possession on account of such forfeiture, the remedy of the mortgagor is to bring an equitable action to redeem. Herman on Mortg., § 191; Jones on Mortg., §§ 683, 684. In this case the mortgagor had the right to bring his equitable action, because the mortgagee had made a sale which it might be necessary to avoid, and because he wished to charge him with the money received on the sale of the half interest, and possibly for the use of the other half interest; and it may also have been requisite to perfect the mortgagor's title that he should have a conveyance from the mortgagee. The Kanes were not necessary or proper parties to the action, for the reason that the mortgagor does not propose to interfere with their title to the undivided half interest in the vessel. He is content to have that

Boyd vs. Beaudin and another.

sale stand, and receive the avails of it from the mortgagee. The joinder of *Roissy* as a party to the counterclaim is not a ground of demurrer. *Willard v. Reas*, 26 Wis., 540; *Marsh v. Supervisors*, 38 Wis., 250.

We think there can be no doubt that the facts pleaded constitute a counterclaim between the appellant *Beaudin* and the respondent. The allegations in the pleading show that the respondent has converted the mortgaged property to his own use without accounting to the mortgagor for the value thereof. It is true, the pleading shows that a sale was made at public vendue; and if the mortgaged property had been purchased at such sale by a third person, in good faith and without any collusion with the mortgagee to defraud the mortgagor, such sale would be upheld notwithstanding the mortgagor had been misled by the agreement set out in the pleading. But the allegations showing that there was a want of good faith in the mortgagee in making the sale at all, and the further allegation that he was himself the purchaser at a merely nominal and grossly inadequate price, and that he has rendered no account to the mortgagor on account of such sale, are clearly sufficient, if proved, to avoid such sale as between the mortgagor and the mortgagee. In order to sustain this pleading as a good counterclaim, it is unnecessary to determine whether in any case the mortgagee may become the purchaser at a public sale, under the mortgage, so as to cut off the equity of redemption in the mortgagor. The later opinions in New York seem inclined to hold that where there is no unfairness on the part of the mortgagee, and the sale is public, and with express notice to the mortgagor, he may be a purchaser, and that such fair sale and purchase will bar the mortgagor's equity. *Hall v. Ditson*, 55 How. Pr., 19; *Olcott v. Tioga Railroad Co.*, 27 N. Y., 546; *Jones on Mortg.*, § 808. This court has held that where there is any unfairness or want of good faith on the part of the mortgagee in making the sale, though it be a public sale, if he becomes the purchaser, such

Boyd vs. Beaudin and another.

sale will be held void at the option of the mortgagor, and in such case he may maintain an equitable action to redeem, notwithstanding such sale; and if the mortgagee, after having purchased such property at the mortgage sale, converts the property by a sale of the same to a third person, he will be held to account either for the value of the property sold, or for the money received upon such sale. *Pettibone v. Perkins*, 6 Wis., 616; *Flanders v. Thomas*, 12 Wis., 410. The counterclaim in the case at bar sets out facts which show conclusively a want of good faith and fairness on the part of the mortgagee in making the sale under the chattel mortgage. His purchase at such sale cannot, therefore, bar the mortgagor of his action to redeem, and compel him to render an account for the money received by him upon the resale of that part of the property which he sold to the Kanes, and for any moneys received from the use of the property remaining unsold; nor of his right to redeem the mortgaged property remaining in the hands of the mortgagee by paying any sum which may be due to him on the mortgage after deducting the moneys so received. This right was affirmed by this court in the case of *Mowry v. First Nat. Bank of Baraboo*, ante, p. 38.

The fourth objection to the counterclaim, "that the alleged cause of action is not pleadable as a counterclaim," we think is not well taken. Admitting that the appellant *Roissy* has no interest in the counterclaim, that fact is no objection to its being set up as a defense by the appellant *Beaudin*. The statute says "the counterclaim must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action." Sections 2656 and 2657, R. S. 1878, provide that counterclaims may be such as were formerly legal or equitable, or both. Under these provisions it seems to us very clear that this was a pleadable counterclaim in this action. It is a claim between the plaintiff and a defendant between whom a several judgment might be had in the action. The defendant in whose favor the coun-

Boyd vs. Beaudin and another.

terclaim exists, is the maker of the notes on which the action is brought, and his co-defendant is an indorser of the same notes; and it is clear that in such cases a several judgment might be had in favor of the plaintiff against the maker. The defenses which the defendants have to the action not only may be different, but in most cases they would be so. They are not in fact jointly liable to the plaintiff, and the right to join them as defendants at all in the same action is derived from the statute. Section 2609, R. S. 1878; *Decker v. Trilling*, 24 Wis., 610; *Clapp v. Preston*, 15 Wis., 543; *Borden v. Gilbert*, 13 Wis., 670; *Cady v. Shepard*, 12 Wis., 639; *Davis v. Barron*, 13 Wis., 227; *King v. Ritchie*, 18 Wis., 554. It comes within the rule laid down in *Dietrich v. Koch*, 35 Wis., 618, "that a counterclaim must be a claim which, if established, will defeat or in some way qualify the judgment to which the plaintiff is otherwise entitled."

If the appellant is entitled to have the money received by the respondent, upon the sale of the one-half interest in the vessel to the Kanes, applied in part payment of the plaintiff's claim on the notes upon which the action is brought, then the counterclaim set up by the appellants comes within the rule above stated, and will defeat the plaintiff's claim to that extent. The claim of the appellants, if established, will be an equitable set-off to the claim of the plaintiff, so far as the money equitably due from the plaintiff to *Beaudin* is concerned. It is unnecessary to determine whether, in an action at law to recover a debt due which is secured by a chattel or other mortgage, the defendant can, by way of counterclaim, maintain an action simply to redeem the property from the mortgage, when no claim is made for an accounting for any moneys received by the plaintiff growing out of the security, which, in equity, should be applied to the extinguishment of the debt upon which the action is brought.

It is further objected that the counterclaim is not sufficient because it is an action to redeem from the mortgage, and

The Inter-Ocean Transportation Co. vs. Sheriffs and others.

there should be an allegation that they have tendered the amount due to the plaintiff, before any such action can be maintained. This counterclaim is more than a simple action to redeem. *Beaudin* has the right to have the money received by the plaintiff on the sale of the half interest to the Kanes applied in part payment of his debt, even though he has shown no right to redeem as to the half interest still owned by the plaintiff. We are, however, of the opinion that when it is necessary for the mortgagee to render an account in order to ascertain what is necessary to be paid by the mortgagor seeking to redeem, no tender is necessary before bringing the action to redeem. And, under the decisions of this court, in similar cases, the want of a tender before suit brought does not defeat the action, but only goes to the question of costs in case the right to redeem be established on the trial. *Wright v. Young*, 6 Wis., 127; *Cunningham v. Brown*, 44 Wis., 72.

We think the court erred in sustaining the demurrer to the counterclaim, and that the order must be reversed.

By the Court.—The order of the circuit court is reversed, and the cause remanded for further proceedings according to law.

THE INTER-OCEAN TRANSPORTATION COMPANY vs. SHERIFFS
and others.

January 11 — February 7, 1882.

Contract for construction of machinery, &c., construed: Duty of reasonable diligence.

By written contract, S. agreed to furnish the material and construct and set up in plaintiff's steam barge, then in construction, an engine and other machinery according to certain specifications, "the whole work to be completed, set up in barge, and ready for trial trip (*if vessel shall be ready for same*), by the first day of April, 1880." He further expressly agreed that if the barge should be ready and he should fail to so complete and set up said machinery by the first of April, he would pay

The Inter-Ocean Transportation Co. vs. Sheriffs and others.

such damages as plaintiff might suffer from such failure. In consideration of this undertaking, plaintiff agreed to pay a certain sum at the time of the execution of the contract, to make other payments at specified dates, and to pay the balance on full performance of the contract by S. *Held*, that if plaintiff failed to have its barge ready in season to enable S., with reasonable diligence, to have the machinery set up therein by the first of April, the latter was still bound to have it so set up within a reasonable time after the barge should in fact be finished; and would be liable to plaintiff for damages caused by his failure to do so.

APPEAL from the Circuit Court for *Milwaukee* County.

The plaintiff appealed from an order sustaining a joint demurrer by the defendants to the complaint as not stating facts sufficient to constitute a cause of action. The substance of the complaint will sufficiently appear from the opinion.

For the appellant there was a brief by *David S. Ordway*, of counsel, and oral argument by *H. M. Finch*.

For the respondents there was a brief by *Jenkins, Elliott & Winkler*, and oral argument by *Mr. Jenkins*. They contended that by the contract plaintiff undertook to have the barge ready for its machinery a reasonable time before the 1st of April, 1880, to enable *Sheriffs* to place the machinery therein by that time; and that, upon this condition, defendants agreed to perform the work by that date, and to pay all resulting damages in case of their failure to do so. The latter obligation was dependent on the former. When a time is specified in a contract, the courts are not at liberty to attach other conditions, or any other time. *Kemp v. Humphreys*, 13 Ill., 593; *Abel v. Munson*, 18 Mich., 306. It is only when the contract is silent as to time, that courts hold that a reasonable time is to be understood. Plaintiff having made default upon its contract on April 1st, *Sheriffs* could have lawfully refused to proceed, and have recovered for the work done. He however proceeded notwithstanding plaintiff's default. Such procedure was upon a *new* contract, for an extension of time; and any action by plaintiff must be upon such new contract, and allege breaches thereof. *Warren v. Bean*, 6 Wis., 120;

Langworthy v. Smith, 2 Wend., 587; *Porter v. Stewart*, 2 Aikens (Vt.), 417; *Vicary v. Moore*, 3 Watts, 451; *Carrier v. Dilworth*, 59 Pa. St., 406; *Littler v. Holland*, 3 Term, 590; *Brown v. Goodman*, id., 592. Such new contract certainly released the bond given to secure the old contract, broken by the plaintiff. The liability of the sureties on that bond was *strictissimi juris*, and could not be extended by implication. *Taylor v. Parker*, 43 Wis., 78. Again, the complaint concedes that plaintiff permitted *Sheriffs* to go on with the work after the expiration of the alleged reasonable time, and accepted the work without claiming, at the time, any damages for delay, and without notification to *Sheriffs* that plaintiff would hold him for such damages. Under such circumstances, inducing *Sheriffs* to continue the work, and unconditionally accepting his work, constituted a waiver of his delay. *Pomeroy v. Shaw*, 2 Daly, 267; *Merrimack Man. Co. v. Quintard*, 107 Mass., 127; *Baker v. Henderson*, 24 Wis., 511.

COLE, C. J. It seems to us a plain proposition that the complaint states facts which entitle the plaintiff to recover some damages. The action is upon a bond executed by the defendant *Sheriffs* as principal, and by the other defendants as sureties. The bond is conditioned that *Sheriffs* shall, without delay, well carry out and fulfill a contract thereto attached, of even date with the bond, which is signed by him. By this contract *Sheriffs* agreed to furnish the material, and construct and set up in the plaintiff's steam-barge, then in process of construction, an engine, boiler and other machinery, according to the specifications therein stated; the whole work "to be completed, set up in barge, and ready for trial trip (if vessel shall be ready for same) by the 1st day of April, A. D. 1880." It is alleged that the barge was not in readiness long enough before the 1st day of April, 1880, so that *Sheriffs* could complete his contract by that day, but that it was ready so that he might easily have completed it by the 1st of May, which

The Inter-Ocean Transportation Co. vs. Sheriffs and others.

was a reasonable time for him to perform his contract after the barge was ready. It is then averred that he failed and neglected to have the barge ready for her trial trip before the 7th of August, 1880, which was an unreasonable delay, in consequence of which the plaintiff lost the use of the barge from the 1st of May to the 7th of August, and sustained damages thereby to the amount of \$13,000.

Other breaches of the bond are stated, but it seems to us these facts alone are sufficient to sustain a claim for damages by reason of a failure to perform the contract. That is to say, by the contract, as we construe its provisions, *Sheriffs* bound himself to complete the work to be done by him, by the 1st day of April, providing the plaintiff had the barge ready in season to enable him to do the work by that day; and if the barge was not ready so that he could do the work by that day, then he was to have a reasonable time for doing it after it was in readiness to receive the machinery. This, we think, is the proper construction of the contract. But it is claimed by the learned counsel for the defendants, that the time for completing the work was absolutely fixed by the parties; and if the barge was not ready for the machinery a reasonable period before the 1st day of April, to enable *Sheriffs* to place the machinery by that time, that then he was released from performing the contract on his part. But we deem this construction of the contract quite inadmissible, for reasons suggested by plaintiff's counsel.

In the first place, there is an absolute undertaking on the part of *Sheriffs* to furnish all the material, and construct and set up in the barge in the process of construction all the engines, boilers and other machinery, ready in all respects for use. In consideration of this undertaking the plaintiff agreed to make payments from time to time, amounting on the 1st of March to \$17,000. The residue of the contract price, to wit, \$5,500, was to be paid when the contract was fully performed. These payments were independent agreements, and *Sheriffs* could insist upon their being made as specified whether he had

The Inter-Ocean Transportation Co. vs. Sheriffs and others.

put any machinery in the vessel or not; and it would be unreasonable to hold that *Sheriffs* might receive all this money and then abandon the contract if the vessel was not ready so that he could complete his work by the 1st of April. There was probably an uncertainty as to when the vessel would be ready to receive the machinery, and the parties must be presumed to have made the contract with reference to that fact. This will account for the peculiar language of the clause above cited, to the effect that if the barge was ready *Sheriffs* should complete his work by the 1st of April. In the event the barge was not ready in season so that he could perform his contract by that time, then he was to do the work within a reasonable time after it was ready. Counsel say that it is only when the contract is silent as to time of performance that performance within a reasonable time, considering the extent and nature of the work, is implied in law; but they say that rule cannot apply here, where the time is actually specified.

This argument is founded on the clause which we have quoted, and another clause which provides that in case the barge shall be ready and *Sheriffs* shall fail to complete and set up the machinery therein ready for use by the 1st day of April, then he should pay such damages to the plaintiff as it might sustain by reason of such failure. From these clauses it is argued that because *Sheriffs* expressly made himself liable for damages arising from his failure to perform by the 1st of April, providing the barge was seasonably ready to receive her machinery prior to that date, this clearly repels the inference of further liability for any other default. And as it is averred that the barge was not ready long enough before the 1st of April so that *Sheriffs* could have completed his contract by that day, therefore he is not responsible for failure to do the work within a reasonable time after it was ready. But we do not think this position is sound. We agree with plaintiff's counsel that the clause in question was not intended to relieve *Sheriffs* from liability if he failed to perform. It refers to one

The Inter-Ocean Transportation Co. vs. Sheriffs and others.

contingency only—a failure to perform by the 1st of April, providing the barge was ready so that he could do the work by that date. But it was not intended to limit his liability in the event he failed to perform within a reasonable time, if the barge was not ready so that he could do the work by that day. The clause must be limited to the particular engagements to which it refers, and should not be extended so as to exonerate *Sheriffs* from his general liability on the contract. As a matter of course, the plaintiff could not unreasonably delay getting the barge ready to receive the boiler and machinery, and then call upon *Sheriffs* to perform. It was bound to use diligence on its part in preparing the barge, as he was in putting in the machinery after it was ready. Their duties were reciprocal in that regard under the contract.

It is unnecessary to observe that the plaintiff could not maintain a claim for damages for a failure to complete the work which was occasioned by its own default. But we are not called upon to consider the rule of damages now. We have only to determine whether the complaint states facts, which, being proven, would entitle the plaintiff to recover any damages. And upon that point we are clear that a cause of action is stated. This is certainly so, unless we can say that *Sheriffs*, under the contract, might decline or refuse to do the work at all if the barge was not ready in time so that he could place the machinery therein by the 1st of April. But for the reasons already stated we think this could not have been the intention of the parties, and that the contract should not be so construed. Without noticing any other question in the case, we must reverse the order of the circuit court sustaining the demurrer, and remand the cause for further proceedings.

By the Court.—So ordered.

Bierbach vs. The Goodyear Rubber Co.

BIERBACH VS. THE GOODYEAR RUBBER COMPANY.

January 12—February 7, 1882.

DAMAGES FOR PERSONAL INJURIES: EVIDENCE. (1) *Injury to business: what proof admissible.* (2) *Pleading and proof.* (3) *Weight of evidence as affected by number of witnesses.*

1. In an action for personal injuries to the plaintiff, which disqualified him to give his personal attention to the business which he had previously carried on, where such business consisted in the manufacture and sale of patented and other machines, it was error to admit proof of the average profits of his business while he carried it on, as a basis for estimating his damages, such a basis being of too uncertain and speculative a character.
2. Under a general allegation in the complaint that, by reason of the injuries complained of, plaintiff has been unable to attend to his ordinary business, he may prove what his business is, and the damages he has suffered by reason of his inability to pursue it. *Luck v. Ripon*, 52 Wis., 196.
3. It is error to charge the jury that, "if the witnesses are equally credible, and they so present themselves to the mind of the jury, then the greater number of witnesses on one side or the other would be entitled to the greater weight."

APPEAL from the County Court of *Milwaukee* County.

Action to recover damages for personal injuries. In July, 1880, the plaintiff was passing along the south side of Grand avenue, in the city of Milwaukee, a little west of the Plankinton House, in his wagon, drawn by one horse. He was going east, and a young man with him was driving the horse. At the point indicated, he concluded to return to his place of business from whence he came, and the driver, by his direction, reined the horse out of the line on which he had been going, to the north and towards the center of the avenue, for the purpose of turning around. The horse had been going at a moderate trot, but in process of turning slackened to a walk. The wagon of the defendant company, also drawn by one horse, driven by a servant of the company, followed the wagon of plaintiff a short distance behind. That horse was also going at a moderate trot. Just as the plaintiff's wagon was leaving the line on

Bierbach vs. The Goodyear Rubber Co.

which it had been moving east, and a little before it reached a position at right angles with that line, the left forward wheel of defendant's wagon collided with the right hind wheel of plaintiff's wagon, about three inches from the tire. The collision upset the plaintiff's wagon, threw him to the ground, and caused the injuries complained of. Both horses were quiet, gentle and easily governed. There was an unobstructed space of about sixteen feet in width between the point of collision and the curb-stone on the south side of the avenue. The collision occurred during the forenoon. A further statement of the case, and some of the rulings of the court on the trial, will be found in the opinion. In addition to certain special findings, the jury found for the plaintiff, and assessed his damages at \$3,000. A motion for a new trial was denied, and judgment was entered pursuant to the verdict; from which the defendant appealed.

For the appellant there was a brief by *E. P. Smith* and *Nath. Pereles & Sons*, his attorneys, and *J. G. Jenkins*, of counsel, and oral argument by *Mr. Smith* and *Mr. Jenkins*. They argued, among other things, 1. That under the pleadings there could be no proof of loss of profits. *Van Santv. Pl.*, 163. Such special damage should be averred with the same particularity as the loss of custom in an action of libel or slander. *Folkard's Starkie*, 484, note; *Townshend on Slander*, 542, note. 2. That, independent of the question of pleading, the evidence given was improper. The loss of profits could not be considered as a necessary result of plaintiff's injury; nor could the amount of past profits properly be proven to enable the jury to conjecture what the future might probably be. *Masterton v. Mount Vernon*, 58 N. Y., 395; *Lincoln v. S. & S. R. R. Co.*, 23 Wend., 425; *Blair v. M. & P. du C. Railroad Co.*, 20 Wis., 262; *Wylie v. City of Wausau*, 48 id., 508. The cases of *Shepard v. Milwaukee Gas Light Co.*, 15 Wis., 318; *Richardson v. Chynoweth*, 26 id., 656; *Fry v. Dubuque etc. Railway Co.*, 45 Iowa, 416; *City of Cincinnati*

Bierbach vs. The Goodyear Rubber Co.

v. Evans, 5 Ohio St., 594; *Griffin v. Colver*, 16 N. Y., 489; *Simmer v. St. Paul*, 23 Minn., 408; 2 Thompson on Negligence, 1263; *Hammer v. Schœnfelder*, 47 Wis., 455—are not in conflict with the above rule. In all these cases the defendant knew of the object of the contract broken by him, or that the plaintiff was engaged, or was to engage, in the peculiar business which his wrongful act interrupted or destroyed. 3. That the court erred in its instruction as to the weight of conflicting testimony. The instruction gave negative evidence the same force as positive, and disregarded the maxim, *ponderantur testes non numerantur*. 2 Burrill Dic., 807; Starkie on Evidence (8th ed.), 735.

For the respondent there was a brief by *Austin & Runkel*, and oral argument by *Mr. Austin*. They contended, *inter alia*, that the instruction as to the weight of testimony was correct. Moak's Underhill on Torts, 321; *Fowler v. Colton*, 1 Pin., 331; *Mercer v. Wright*, 3 Wis., 645; *Moore v. Kendall*, 2 Pin., 99. The court did instruct the jury that it was their province to weigh the evidence (*Wright v. Hardy*, 22 Wis., 348), and gave in addition a further instruction in almost the exact language used and approved in *Saunderson v. Lace*, 2 Pin., 257.

LYON, J. Numerous errors are alleged on behalf of the defendant, but the conclusion we have reached upon two of them renders it unnecessary to pass upon the others.

1. On the trial, the plaintiff testified in his own behalf that, when injured, his business was the manufacturing of machines for cleaning feathers, and another article known as the Bierbach wagon patent, and that he continued in such business for several months after he was injured, when he sold out and gave it up. He also testified in his own behalf, under objection, that his average business was worth from \$75 to \$100 per month, and that he gave it up because, on account of his injuries, he was unable to attend to it. To the question: "After

Bierbach vs. The Goodyear Rubber Co.

you were injured, did you carry on your business for any length of time?" put to him by his counsel, he answered, "Yes, sir; I carried it on, but I did not attend to it but a few months. I got negligent and didn't care, I was in such a condition. But when orders came, my man would attend to them." As a basis for the assessment of damages, proof of the average value of the plaintiff's business while he carried it on was clearly incompetent. It could only be used to enable the jury to estimate therefrom what the future profits would have been had the plaintiff not been injured, and had he continued in the business. Such a basis for the estimate of the future profits of the business in which the plaintiff was engaged, is altogether too uncertain to furnish a safe guide for the verdict of a jury.

In *Masterton v. Mount Vernon*, 58 N. Y., 391, the plaintiff sued a municipal corporation to recover damages for personal injuries caused by a defective highway. It appeared that the plaintiff and his partner were importers and dealers in teas, and had been for many years. The plaintiff made the purchases, which required a high degree of skill. He possessed the requisite skill. Their business was extensive, but there was a great falling off in it because the plaintiff was unable, by reason of the injuries complained of, to make the purchases. Judgment for the plaintiff was reversed because the trial court permitted the plaintiff, testifying in his own behalf, to answer this question: "About what have been your profits, year by year, in that business?" After referring to several cases, and among them to the cases of *Nebraska City v. Campbell*, 2 Black, 590, and *Wade v. Leroy*, 20 How. (U. S.), 34, in which it was held competent for a physician, in an action for personal injuries, to prove the extent of his practice, the court proceeds to say: "In none of these cases is any intimation given that proof may be given as to the uncertain future profits of commercial business, or that the amount of past profits derived therefrom may be shown, to enable the jury to conjecture what

Bierbach vs. The Goodyear Rubber Co.

the future might probably be. These profits depend upon too many contingencies, and are altogether too uncertain, to furnish a safe guide in fixing the amount of damages. . . . The plaintiff had the right to prove the business in which he was engaged, its extent, and the particular part transacted by him, and, if he could, the compensation usually paid to persons doing such business for others. These circumstances the jury have a right to consider in fixing the value of his time. But they ought not to be permitted to speculate as to the uncertain profits of commercial ventures in which the plaintiff, if uninjured, would have been engaged."

The foregoing remarks apply with equal force to this case, and it is believed that they contain a sound exposition of the law of evidence applicable to it. Substantially the same principle was applied by this court in *Blair v. Mil. & Pr. du C. Railroad Co.*, 20 Wis., 262. Indeed, the testimony, the admission of which worked a reversal of the judgment in that case, was more direct and specific, and hence less objectionable, than that admitted in the present case. There the testimony was confined to the damages sustained by the plaintiff's firm by reason of the inability of the plaintiff to give his personal attention to the business, while here the testimony goes to the value of the whole business, when it is apparent that the plaintiff might have continued the business by employing proper agents to carry it on, notwithstanding his injuries. See also *Lincoln v. Railroad Co.*, 23 Wend., 424.

We conclude that it was error to permit the plaintiff to give testimony of the value of his business when he carried it on. In view of the large damages awarded by the jury, it is fair to presume that such testimony materially enhanced the damages. It is clear that it may have done so. Hence, the error is material, and fatal to the judgment.

It was also argued on behalf of the defendant, that the testimony, if otherwise competent, was inadmissible under the complaint, because no special damages for loss of or injury to

Bierbach vs. The Goodyear Rubber Co.

his business are claimed therein by the plaintiff. It is alleged that by reason of the injuries complained of the plaintiff has been unable to attend to his ordinary business. In *Luck v. City of Ripon*, 52 Wis., 196, this court held that under such general allegation, in an action like this, it is competent for the plaintiff to prove what his business is, and the damages he has suffered by reason of his inability to pursue it.

2. The court, instructing the jury as to the rules for determining the relative weight of conflicting testimony, used this language: "Of course, if the witnesses are equally credible, and they so present themselves to the mind of the jury, then the greater number of witnesses on one side or the other would be entitled to the greater weight." We think the instruction was erroneous. It laid down an arbitrary rule for determining which way the evidence preponderated where there was a conflict of testimony. That is to say, the witnesses being equally credible, disputed propositions of fact should be determined by a count of the witnesses and an application of the majority rule. We are not aware of the existence of any such rule of evidence. Indeed, in *Van Doran v. Armstrong*, 28 Wis., 236, this court substantially held that there is no such rule, but that the jury are free to believe the minority of the witnesses, and a verdict based upon the testimony of such minority will not be disturbed because opposed to the testimony of the majority. The jury alone are to determine not only the credibility of the witnesses, but also the weight which should be given to the testimony of each. The above instruction invaded the province of the jury in that respect, and was an unwarrantable interference with their peculiar and exclusive functions.

There is another fatal objection to the instruction. It ignores every condition but that of credibility, whereas there are other conditions which should be considered in framing a rule on that subject. It makes no distinction between the relative weight of positive and negative testimony—a dis-

Mezchen vs. More, imp.

tion well established in the law (3 Greenl. Ev., § 375; *Ralph v. Railway Co.*, 32 Wis., 177), and it takes no account (in terms, at least) of the possible fact that some of the witnesses may have had better facilities for knowing the facts than others, or remembered them more distinctly. The jury may well have understood the word "credible" to refer only to the integrity of the witnesses. But the most serious objection to the instruction is the one first above indicated, to wit, that it invaded the province of the jury, and sought to bind them by a rule unknown in the law. This error was also material, and may have prejudiced the defendant. There was conflicting testimony on material propositions of fact, and some of the testimony hostile to the defendant's theory of the case was negative in its character. Besides, some of the witnesses had better means of knowing the facts to which they testified, than some of the opposing witnesses who testified in relation to the same facts.

Because of the two errors above indicated, the judgment of the county court must be reversed, and the cause remanded for a new trial.

By the Court.—So ordered.

MEZCHEN vs. MORE, imp.

January 13 — February 7, 1882.

SUMMONS. *Printed signature.*

Under our statute (R. S., secs. 2629-30), which provides that the summons in a civil action "shall be subscribed by the plaintiff or his attorney," it is not necessary that the name of the plaintiff or his attorney be written in his own hand at the bottom of the summons, but it may be printed.

APPEAL from the Circuit Court for *Milwaukee* County.

The plaintiff appealed from an order, whose character is stated in the opinion.

Mezchen vs. More, imp.

For the appellant there were separate briefs by *Frank B. Van Valkenburgh*, his attorney, and *Jenkins, Elliott & Winkler*, of counsel, and oral argument by *Mr. Jenkins* and *Mr. Van Valkenburgh*.

J. J. Orton, for the respondent.

TAYLOR, J. This is an appeal from an order setting aside the judgment, mortgage sale, and all other proceedings in the action, because the original summons in the action had the names of the attorneys who issued the same printed thereon. The defendants did not appear in the action, and judgment was taken against them by default, all the other proceedings in the action appearing to have been regularly taken. The learned circuit court held the proceedings were void, because the summons in the action was not subscribed in the handwriting of the attorney who issued the same. The statute, secs. 2629, 2630, R. S., provides that a civil action shall be commenced by the service of a summons, and, after describing what it shall contain, says: "It shall be subscribed by the plaintiff or his attorney, with the addition of his post-office address, at which papers in the action may be served on him by mail." It is insisted by the learned counsel for the respondent, and was held by the circuit court, that this provision of the statute requires the summons to be subscribed by the party or his attorney in his own proper handwriting, and that if not so signed it is absolutely void.

We think the learned counsel and the court erred in giving the statute this restricted construction. The summons is not a writ or process of the court, but is simply a notice to the defendant that an action has been commenced against him, and that he is required to answer to the complaint which is either attached thereto or is or will be filed in the proper clerk's office. *Porter v. Vandercook*, 11 Wis., 70; *Rahn v. Gunnison*, 12 Wis., 528; *Johnston v. Hamburger*, 13 Wis., 175. It is substantially the same method of commencing an action which

Mezchen vs. More, imp.

was long practiced in the state of New York before the adoption of the code, viz., by filing a declaration with the clerk of the court in which the action was commenced, and entering a rule requiring him to plead, and then serving upon the defendant a copy of the complaint and a notice of such rule. The summons is, in fact, a notice to the defendant that an action is commenced against him, and that he must answer the complaint within a certain time or judgment will be taken against him. The only object of requiring it to show the name of the attorney or party who commences the action, and his post-office address, is that the defendant may know upon whom and at what place he may serve his answer and other papers in the action. "That this is the object is apparent from the fact that the same section provides that the summons shall state the title of the cause, the court in which the action is brought, the county where the action is to be tried, and the names of the parties."

These facts give the defendant all the knowledge necessary to enable him to plead to the action, except the knowledge of the person upon whom and the place where his answer and other papers must be served. This object is certainly as well accomplished when the name of the party or attorney is printed at the end of the summons as when it is written there; and unless the statute is imperative in requiring the signature in the handwriting of the attorney or party, there does not appear to be any reason for giving it that construction. We think the argument of the learned counsel for the appellant demonstrates that the statute does not require the written signature of the attorney or party. The authorities cited from the courts of New York, giving construction to the same provision of law in that state, are quite satisfactory, and we are disposed to follow them. *Barnard v. Heydrick*, 49 Barb., 62; *Eife Ins. Co. v. Ross*, note to the case of *Hunter v. Lester*, 10 Abb. Pr., 260; 1 Wait, 472; *Clason v. Bailey*, 14 Johns., 484; 1 Maddock's Ch. Pr., 375. This question was somewhat

Mezchen vs. More, imp.

considered by this court in the case of *Scott v. Seaver*, 52 Wis., 175, 183, 184, and the rule upon this subject as laid down by the New York courts was approved.

It is urged by the learned counsel for the respondent, that the court should not follow the decisions of the New York courts upon this question, because subd. 19, sec. 4971, R. S., upon the construction of statutes, is not found in the New York statutes. We are at a loss to see how this statute defining the meaning of the words "written signature of any person," in any way affects the construction of a statute that merely requires a notice to be "subscribed by the party or person issuing it." It is begging the whole question to decide that the last phrase means "written signature;" and unless it does, the subdivision above referred to has no effect upon the question at issue. The meaning of this subdivision was commented upon in the case of *Scott v. Seaver*, *supra*. We there said: "Section 4971 is a section defining words or phrases used in the statutes, and that part of subdivision 19 above quoted must be limited to cases where the statute expressly or by necessary implication requires 'the written signature of a person.'" And in regard to the section of the statute then under consideration we further said: "We do not think such construction must necessarily be given to the section under consideration. It does not say in terms that the consent and certificate shall be signed with the written signature of the assignee and officer, nor do we think that the purposes of the statute necessarily require such written signature in their proper handwriting. The object and purpose of the statute are as fully accomplished when their signatures are signed by another in their presence, and with their consent, as when signed with their own proper handwriting." These remarks are quite as applicable to the case at bar as to the case then under consideration. As the statute now to be construed does not require in terms that the summons shall be signed in the proper handwriting of the attorney issuing the same, and as the purposes of the statute

Mezchen vs. More, imp.

are as fully accomplished by attaching thereto the printed signature, there is no substantial reason why such printed signature should not be construed to be a subscription within the meaning of the law.

The case of *Mericle v. Mulks*, 1 Wis., 366, upon which the learned counsel for the respondent places great reliance, is, we think, clearly distinguishable from the present case. The statute in that case required the supervisors to issue a warrant and sign the same. Such warrant was a process which authorized the officer to whom it was issued to collect a tax, and it might well be held in such case that the duty of issuing such process, when conferred upon a public officer, could not be delegated to another. In *Williams v. Mitchell*, 49 Wis., 284, it was held that where the statute made it the duty of the supervisors to give a notice of their intention to act upon a petition to lay out a highway, such notice might be made out by some one authorized by them, and need not be signed in their own handwriting. In the first case the warrant was in the nature of a final judgment subjecting the property of the citizens to the payment of certain taxes, and in the second it was a mere notice that they would take action upon a given subject in which the citizens were interested; and in such case all that is essential is that the notice shall be in such form as to accomplish the purpose for which it is given.

The case of *Ames v. Schurmeier*, 9 Minn., 221, sustains the position taken by the learned circuit judge; but we think much of the force of that decision is taken away by the decision by the same learned court in the case of *Hotchkiss v. Cutting*, 14 Minn., 538. In the first case the learned court seemed to base its decision upon the defining statute, which, like ours, provides "that in all cases where the written signature of any person is required by law, it shall always be the proper handwriting of such person," and not upon the statute prescribing how the summons must be signed. The court seemed to take it for granted that the latter statute required

Mezchen vs. More, imp.

the written signature of the attorney or party, and therefore, under the defining law, such subscription must be in the proper handwriting of such attorney or party; but in the last case the court held that the summons was sufficient if signed by a third person in the presence and by the direction of the attorney or party whose name is attached thereto. This latter decision does away with the necessity of a signature in the proper handwriting of the party or attorney; and if such signature be not necessary, then there does not appear to be any necessity for a written signature at all. Any signature which he adopts as his, whether written or printed, accomplishes the purpose and gives all the information necessary. If the attorney or party may delegate his authority to another to sign his name to the summons, there would seem to be no necessity that such signing should be in his presence. Holding that the signature would be sufficient if made at the request and in the presence of the attorney or party, and void if made out of his presence, would be overcritical and lead to unnecessary trouble. That it was done in the presence of the attorney could add nothing to its efficacy in giving information to the defendant or the court as to its authenticity. The important question is, Was it signed by his authority?

We can see no evil results which would be likely to follow from allowing a summons to be issued with the printed signature of the attorney or party, which would not result from allowing it to be signed in writing by an authorized clerk or agent of the attorney or party. There does not seem to be any middle ground. It must either be held that the statute requires the written signature of the attorney or party, and comes within the defining statute which in such case requires the signature in his proper handwriting in every case where such attorney or party is able to write; or we must hold that the statute which requires simply subscription does not require the written signature of such attorney or party, and may therefore be complied with by a written or printed signature

Eviston vs. Cramer and others.

at the option of the party issuing it. The latter construction appears to be better sustained by the authorities than the first. We have no doubt that such is the proper construction.

By the Court.—The order of the circuit court is reversed.

EVISTON VS. CRAMER and others.

January 13 — February 7, 1882.

LIBEL: PLEADING: VERDICT: COSTS ON APPEAL. (1) *Pleading in mitigation of damages, after justification.* (2) *Special verdict as to malice, construed.* (3) *Costs on reversal, notwithstanding respondent's offer of new trial, etc.*

1. Under our statute relating to actions for libel, where the publication is *prima facie* libelous, facts and circumstances tending to overcome or lessen the presumption of malice, if properly pleaded in mitigation of damages, may be proved; and this though the truth of the publication has also been alleged in *justification*.
2. A special verdict to the effect that the publication complained of was false, but defendant did not publish it "with intent to injure plaintiff's feelings and degrade him in the estimation of the public," does not negative all malice, and therefore does not cure the error of the court in excluding evidence in mitigation of damages.
3. The reversal must be with costs against the respondent, notwithstanding his offer of a new trial in the court below, or of a reversal here without costs, as the appellants were entitled to a review by this court of the instructions.

APPEAL from the Circuit Court for *Milwaukee* County.

Action for libel. Upon a former appeal in the cause, it was held on demurrer that the publication in question was *prima facie* libelous. 47 Wis., 659. Subsequently the defendants answered, admitting the publication, and, besides denying malice and intent to injure the plaintiff, alleged, in effect, the truth of the facts stated in the article in justification of the publication, and also set up the same facts and circumstances

Eviston vs. Cramer and others.

in mitigation of damages, and claimed that, under the facts and circumstances so set forth in the answer, the publication was privileged.

The instructions given to the jury, so far as important here, are stated in the opinion. Five questions were submitted for a special verdict; and by their answers to these the jury found that the article complained of was published as alleged in the complaint; that defendants were, at the time of such publication, the proprietors and publishers of the newspaper in which it appeared; that said article was false; that it was *not* "published with the intent to injure the plaintiff's feelings and degrade him in the estimation of the public; and that plaintiff had suffered damage by reason of the publication of said article," in the sum of \$100.

From a judgment entered for plaintiff pursuant to the verdict, defendants appealed.

J. J. Orton, for the appellants.

For the respondent there was a brief by *Cottrill, Cary & Hanson*, and oral argument by *Mr. Cottrill* and *Mr. Hanson*. They contended, *inter alia*, that the evidence whose rejection is complained of, would, if admitted, have gone only to the reduction of *punitive* damages. The court, however, instructed the jury that they might give compensatory damages, "and if they found it was done [i. e., the publication was made] willfully and maliciously, then they might give punitive damages, if they found the facts [alleged in the article] had not been proven." The jury found that the article was not published with a bad intent; and it must be presumed that they followed the direction of the court, and did not include punitive damages in the amount awarded by them as damages. *Klewin v. Bauman*, 53 Wis., 244.

CASSIDAY, J. The statute gives to the defendant, in an action for libel or slander, the right to allege in his answer both the truth of the matter charged as defamatory, and any miti-

Eviston vs. Cramer and others.

gating circumstances, to reduce the amount of damages. Sections 2677-8, R. S. The statute goes still further, and gives such defendant the right, whether he prove the justification or not, to give in evidence the mitigating circumstances. Section 2678, R. S. These sections of the statute were in force at the time of the publication in question. Sections 26, 27, ch. 125, R. S. 1858. Notwithstanding these express statutory rights of the defendants, the trial judge, after commenting upon other provisions of the statute, charged the jury as follows: "There is another rule that is well settled in the courts, and that is, that when a party pleads in justification the truth of the alleged facts set forth in the libel, *then he is bound by that line of defense*. He cannot set up both the justification and the truth of the facts charged, and at the same time plead other facts in mitigation of damages. *He must either take one horn or the other of the dilemma*. If a libel has been published, and it has been done through mistake, inadvertence, or a thousand other things that may arise as a partial excuse, then these facts must be set up. *They must admit the libel* and plead these other matters in excuse by way of mitigation, *or they may take the other horn of the dilemma*, and plead that the facts charged *are true*, and that they will be proven upon the trial. Now, that is the *status* of an action of this character. In this case the defendants have seen proper to rest their defense on the plea that the facts charged, whether libelous or not, are true, and that is the reason why this court has held the defendants to the strict proof under the law."

These portions of the charge were so obviously in direct violation of the rights secured to the defendants under the pleadings by the statutes above referred to, as not to require comment or the citation of authority. But see *Kennedy v. Holborn*, 16 Wis., 457; *Wilson v. Noonan*, 35 Wis., 346-S; *Kimball v. Fernandez*, 41 Wis., 329; *Bush v. Prosser*, 11 N. Y., 347; *Bisbey v. Shaw*, 12 N. Y., 67. The trial judge may have inadvertently overlooked the fact that the facts and

Eviston vs. Cramer and others.

circumstances were pleaded in mitigation as well as in justification. However this may be, so palpable was the error contained in these portions of the charge that counsel for the plaintiff do not attempt to justify it, but insist that it should not work a reversal because no exception was taken to it. It is true, no exceptions to the charge appear in the printed case, but, as stated by counsel for the defendants upon the argument, we find forty-nine specific exceptions to the charge filed in the record, and they clearly cover the portions of the charge in question. For these manifest misdirections the judgment must be reversed, if there is any evidence in the record or offered upon the trial making them material, unless the error was cured by the verdict.

The article published does not purport so much to be a statement of facts within the knowledge of the writer, as what had been "charged," "alleged," "claimed" and "said" by others in regard to the manner in which the plaintiff had performed the duties of the office of sealer of weights and measures. The substance of many of the very numerous exceptions taken on the trial is, that the court excluded evidence tending to show that just prior to the publication inquiries were made in behalf of the defendants, of certain persons named in the answer, in respect to the truthfulness of certain rumors in regard to the plaintiff's conduct while holding that office, and, believing the information received to be correct, the article in question, embodying the same, was written and in good faith published in the paper of the defendants for the information of the citizens of Milwaukee interested in the manner in which the duties of the office had been performed. Did such evidence tend to overcome or lessen the presumption of malice, or mitigate the damages to which the plaintiff would otherwise have been entitled?

The case is clearly distinguishable from *Haskins v. Lumsden*, 10 Wis., 359, which arose before the code, and the only plea was the general issue and the truth of the statements

Eviston vs. Cramer and others.

contained in the publication. But even there the existence of common rumors and reports of the truth of the libelous matter was excluded on the ground that the publication did not state nor refer to such rumors or reports as authority for the publication. Judge Dixon, giving the opinion of the court, said: "We do not, however, wish to be understood as . . . saying that such rumors might not be proved, to rebut the presumption of malice, in a case where the charge is made because of them, and referring to them as authority, or where it is simply asserted that such rumors and reports prevail, without at the same time asserting a belief in their truth." The case is also distinguishable from *Sans v. Joerris*, 14 Wis., 663, where the truth of the publication was alleged in justification, but nothing set up in mitigation. In *Saunders v. Mills*, 6 Bing., 213, the defendant was allowed under the general issue, and in mitigation of damages, to show that he copied the statement from another newspaper. A similar holding was had in *Huson v. Dale*, 19 Mich., 17.

In the light of these two cases, and under a statute similar to ours, it was held, in *Hewitt v. Pioneer Press Co.*, 23 Minn., 178, that "in an action for libel the defendant (the fact being properly pleaded) may, in mitigation of the damages, prove that, prior to publishing the alleged libel, it had seen the same matter published in other newspapers." In the opinion of the court in that case it is said, that, "to show want of actual malice, it is proper for the defendant to prove that, at the time of the publication, he reasonably believed the libelous writing to be true. Any fact tending to show such reasonable belief may be proved." The same rule prevails in California, where they have a similar statute. *Lick v. Owen*, 47 Cal., 252. See *Samuels v. Evening Mail*, 9 Hun, 288.

The statute manifestly was intended to do away with the old theory that the more truthful the publication the more aggravating the libel. Under the statute, the truth of the publication, properly pleaded and proved, is a complete defense.

Eviston vs. Cramer and others.

The statute goes further, and allows, in connection with such plea of justification, as well as without it, any mitigating circumstances, notwithstanding they necessarily imply the falsity of the publication, to be pleaded and proved to reduce the amount of damages. The statute is certainly in harmony with the spirit of justice. To hold that one who seeks for the truth, and upon obtaining and publishing what he has good reason to believe to be true, though in fact false, shall be inflicted with the same amount of damages as though such publication were made knowing the same to be false, would be to put an honest and truthful intention on a level in respect to the measure of liability with the most false and wicked designs. It is well that such is not the law of Wisconsin. In this case we are constrained to hold, not only upon authority but upon the language of our statute, that, where the publication is *prima facie* libelous, facts and circumstances tending to overcome or lessen the presumption of malice, if properly pleaded in mitigation of damages, may be proved. Here such facts and circumstances were properly pleaded, but were improperly excluded by the court, and it remains to be seen whether the error was cured by the verdict. The special verdict finds that the article published was false, but was not published "with the *intent* to injure the plaintiff's feelings and degrade him in the estimation of the public." This certainly did not negative all malice. At most it merely negatived two elements of express malice. Malice might well have existed and manifested itself in other directions than the two named. This being so, the error in excluding the class of evidence referred to, and charging the jury as indicated, was not cured by the verdict.

Counsel for the respondent insisted that in case of reversal it should be without costs, for the reason that they offered to allow the verdict to be set aside and a new trial had in the court below, and a reversal without costs on this appeal. But it is manifest that a new trial, with the same rulings and the same charge, was not a desirable thing for the appellants, and

Howland vs. The Milwaukee, Lake Shore & Western R'y Co.

it should not be forced upon a party by indirection. See *Gutwillig v. Stumes*, 47 Wis., 434.

Whether the facts and circumstances alleged in the answer and sought to be proved were such as to bring the case within what is termed privileged communications, it is unnecessary here to determine, and we purposely refrain from considering them at this time. For convenience we refer, however, to *Carpenter v. Bailey*, 53 N. H., 590; *Palmer v. Concord*, 48 N. H., 211; *Van Wyck v. Aspinwall*, 17 N. Y., 190; *Wilson v. Fitch*, 41 Cal., 363.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

HOWLAND VS. THE MILWAUKEE, LAKE SHORE AND WESTERN
RAILWAY COMPANY.

January 13—February 7, 1882.

RAILROADS: NEGLIGENCE. *Known perils of employment: Negligence of fellow-servant.*

Plaintiff, while going as a shoveler of snow for the defendant company upon a train engaged in the business of removing snow from the track, was injured by the overturning of the car in which he rode, by reason of an unsuccessful attempt of the conductor to remove a snow-bank from the track by means of the snow-plow alone, aided by the momentum of the train. *Held*, upon all the facts set out in the complaint, that a recovery by plaintiff is precluded by the facts that such overturning of his car was one of the perils of the business which he assumed, and that the conductor and others whose negligence is alleged, were fellow-servants in the same employment.

APPEAL from the Circuit Court for *Milwaukee* County.

Action for injuries to plaintiff's person, alleged to have resulted from defendant's gross negligence. The defendant appealed from an order overruling its general demurrer to the

Howland vs. The Milwaukee, Lake Shore & Western R'y Co.

complaint. The substance of the complaint is stated in the opinion.

For the appellant there was a brief by *Cottrill, Cary & Hanson*, and oral argument by *Mr. Hanson* and *Mr. Cottrill*.

Geo. B. Goodwin, for the respondent:

1. Where two employees of a company are in a different line of employment, and one is injured by the negligence of the other, the company is liable. A carpenter employed to work about the cars is not a fellow-servant of the engineer. *Pyne v. Railroad Co.*, 54 Iowa, 223. Where a carpenter was employed to build a bridge, and took passes to get to his work in loading timber, and was injured, the company was held liable. *Gillenwater v. Railroad Co.*, 5 Ind., 340; *Fitzpatrick v. Railroad Co.*, 7 id., 436. A laborer carried on a construction train is not a coëmployee with the conductor. *Lalor v. Railroad Co.*, 52 Ill., 401; *L. & N. Railroad Co. v. Collins*, 2 Duv. (Ky.), 114; *Railroad Co. v. Fort*, 17 Wall., 553. Plaintiff had a right to obey the order of the conductor. The latter held a superior and commanding position. *Bradley v. Railroad Co.*, 62 N. Y., 99; *Louisville & N. Railroad Co. v. Bowler*, 9 Heisk., 66; *L. M. Railroad Co. v. Stevens*, 20 Ohio, 415; *C. & C. Railroad Co. v. Keary*, 3 Ohio St., 201; *Berea Stone Co. v. Kraft*, 31 id., 287, 292; *M'Naughtons v. Railroad Co.*, 28 L. T. Rep. (N. S.), 376; *O'Donnell v. Railroad Co.*, 59 Pa. St., 239; Whart. on Neg. (2d ed.), sec. 229, note 4. A subordinate servant injured by the negligence of a servant of superior grade can recover. *Haynes v. E. Tenn. & Ga. Railroad*, 3 Cold., 222; *Booth v. B. & A. Railroad Co.*, 73 N. Y., 38; *Flike v. Railroad Co.*, 53 id., 549; *Ryan v. Railway Co.*, 60 Ill., 171; *T. W. & W. Railway Co. v. O'Connor*, 77 id., 391; *C. & N. W. Railway Co. v. Moranda*, 93 id., 302; *C. & N. W. Railway Co. v. Bayfield*, 37 Mich., 205. 2. The plaintiff had no reason, from the character of his employment, to believe that the train taking him to his place of employment would be used as a snow-plow, or would

Howland vs. The Milwaukee, Lake Shore & Western R'y Co.

be forced into a snow-bank. He had a right to expect as safe a carriage to his place of employment as a passenger would have. Whart. on Neg. (2d ed.), § 206; *Mann v. Print Works*, 11 R. I., 152. The conductor stood for the company, and his gross negligence, forcing the plaintiff into a danger not incident to his employment, renders the company liable. *K. P. Railroad Co. v. Little*, 6 Rep., 199; *Schultz v. C., M. & St. P. Railway Co.*, 48 Wis., 381.

ORTON, J. The following appears to be a reasonable interpretation of the complaint, having reference to what is briefly expressed and clearly implied in its very imperfect statement of the facts: The defendant's train, with the conductor and others in charge of it, was at the time engaged in the business of clearing the railroad track from accumulations of snow upon it, and for that purpose the train was furnished with the usual appliances, including a snow-plow. The plaintiff, with several others, was employed to go upon and with the train to use shovels in assisting to remove snow from the track at a place or places near the village of Humboldt, where their services might be needed. It is not unreasonable to assume, from common experience and the usual conduct of such business, that the plaintiff and the other servants of the company employed to use the shovel were to perform such service in connection with the snow-plow and other appliances on the train, and were to use their shovels in removing any snow-banks from the track which could not be readily removed by the snow-plow; and, if the snow-plow could readily run through the bank, those employed were to remain on board the train until they should come to a place where their services with the shovel should be required. It may also be assumed that it could not always be ascertained beforehand whether any particular bank of snow could be readily or safely removed by the plow, without a trial and an attempt to do so. There is no allegation in the complaint that there was anything in the appearance of the par-

Howland vs. The Milwaukee, Lake Shore & Western R'y Co.

ticular bank of snow where this accident happened, to indicate beforehand that it would be dangerous to attempt to remove it in this way; although there is an averment that the "train was, with great force, and in a grossly careless and negligent manner, forced into said large bank of snow, thereby causing the car . . . to be violently thrown over," etc. When the first considerable bank was reached on this expedition, the conductor, after commanding the plaintiff and the other shovelers to stay aboard of the train, caused the train to be drawn back quite a distance to get a good start and sufficient impetus, and then to be propelled into the bank with great force, in order to clear it from the track, but in doing so the car in which the plaintiff and the other shovelers were, and probably the forward end of the train also, were turned over, and the plaintiff greatly injured. From this complaint, so construed—and we think this construction a reasonable one—the following inferences may be reasonably drawn, which constitute sufficient reasons in the law why the plaintiff is not entitled to recover: *First.* The plaintiff and the others employed to shovel snow, and the conductor and others in the charge and management of the train and snow-plow, were engaged in the same business of clearing off the snow which obstructed the railroad, and in such business they were coëmployees and fellow-servants. *Second.* The train, snow-plow and shovels were the means and appliances to be used in this general business. *Third.* The turning over the train in attempting to pass through a bank of snow with the snow-plow, was one of the perils of the business, and a risk which all those engaged in the business and employment assumed. *Fourth.* If there was any culpable negligence by any one engaged in the running of the train or snow-plow, it was the negligence of a fellow-servant with the plaintiff, for which he cannot recover.

The authorities sustaining these positions are so numerous that only a few need be cited. In a very recent case in this court, *Naylor v. C. & N. W. Railway Co.*, 53 Wis., 661, it

Howland vs. The Milwaukee, Lake Shore & Western R'y Co.

was held that the railway company was not liable for the injury of the plaintiff from the falling down of an embankment upon him where he was shoveling gravel upon a gravel train, by the alleged negligence of the conductor of the train, on the ground that his injury was one of the hazards of his employment. The case of *Sullivan v. India Manuf'g Co.*, 113 Mass., 396, is cited in that case, in which DEVENS, J., uses the following language, much in point: "Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions had been neglected." The following cases are also cited: *Ladd v. Railroad Co.*, 119 Mass., 412; *Clark v. Railroad Co.*, 2 Am. & Eng. R. R. Cas., 240. The following authorities are to the same effect: Fraser, Law of M. & S., 210; *Morgan v. V. of N. Railway Co.*, L. R., 1 Q. B., 148; *Lovell v. Howell*, L. R., 1 C. P. Div., 161; Moak's Underhill on Torts, 52; *Steffen v. Railway Co.*, 46 Wis., 259; *Smith v. Railway Co.*, 42 id., 526; *Flannagan v. Railway Co.*, 50 id., 462. In connection with the risks and hazards of the common business, the plaintiff's being a fellow-servant and coëmployee with the conductor and others in charge of the train prevents his recovery. *Feltham v. England*, L. R., 2 Q. B., 33; *Tunney v. Midland Railway Co.*, L. R., 1 C. P., 291; *Seaver v. Boston & Me. Railroad*, 14 Gray, 466; *C. & A. Railroad Co. v. Murphy*, 53 Ill., 336; *Chamberlain v. Railroad Co.*, 7 Wis., 425; *Moseley v. Chamberlain*, 18 Wis., 700; *Cooper v. Railway Co.*, 23 Wis., 668; *Stetler v. Railway Co.*, 46 Wis., 498; *Brabbitts v. Railway Co.*, 38 Wis., 289.

The law in respect to the assumed hazards of the employment and the negligence of a fellow-servant is so well settled as to be almost elementary, and it is useless to cite other authorities than those found in the brief of the learned counsel of the appellant, which are so clearly in point. It is presumed that the learned counsel of the respondent would not contend that the plaintiff could recover upon this interpretation of the

Elliott and another vs. Espenhain and another.

complaint, as upon the argument it was insisted that the train and the conductor were not engaged in the business of clearing the track from snow, and that no snow-plow was used, and that the conductor and the plaintiff were not engaged in the same business. But, as we think the facts above stated are clearly implied by what is expressly stated in the complaint, the law of the case against the plaintiff's recovery is unquestionable.

By the Court.—The order of the circuit court is reversed, and the cause remanded for further proceedings according to law.

ELLIOTT and another vs. ESPENHAIN and another.

January 14—February 7, 1882.

PLEADING. *Answer construed: Does it deny or admit alleged partnership? Conditional counterclaim.*

In an action against E. and B. for goods sold and delivered to them as partners, B. answered denying material allegations of the complaint, and also alleged that "although no copartnership relations in fact ever existed between him and E., still, for the sole reason that he desired to have the case disposed of on the merits, the allegations of the complaint as to a copartnership were not controverted." He also, by way of counterclaim, alleged certain facts as to a non-delivery by plaintiffs of goods sold by them to E., and that "by reason of said premises and the failure of plaintiffs to perform their contract, the defendant E., and this defendant (B.) if he should be adjudged herein to be a partner of said E., have sustained damages," etc. *Held,*

1. That the answer must be construed as admitting the partnership alleged in the complaint.

2. That after such averment and admission, B., as one of the partners, might, by his separate answer, set up the counterclaim in favor of the firm.

APPEAL from the County Court of *Milwaukee* County.

Action to recover an unpaid balance for certain merchandise sold and delivered by the plaintiffs to the defendants. The

Elliott and another vs. Espenhain and another.

complaint contains an averment that, at the time the goods were sold and delivered, the defendants were copartners, doing business under the name, firm and style of *Espenhain & Bartels*. The defendant *Bartels* answered separately. In his amended answer he denied most of the material allegations of the complaint. He also alleged therein "that, although no copartnership relations, as a matter of fact, have ever existed between this defendant and the defendant *Espenhain*, still, being desirous of disposing of this case on the merits, and for that reason only, the allegations of the copartnership, as contained in the complaint, are not controverted herein." The amended answer of *Bartels* also contains a counterclaim for damages equal in amount to plaintiff's demand, for non-delivery of certain other goods which the plaintiffs had theretofore sold and agreed to deliver to *Espenhain*. The counterclaim, after a detailed statement of the facts upon which it is predicated, is as follows: "That by reason of said premises, and the failure of the plaintiffs to perform and complete their contract, the defendant *Espenhain*, and this defendant if he should be adjudged herein to be a copartner of said *Espenhain*, have sustained damages," etc. The plaintiffs demurred to such counterclaim on the grounds — *first*, that it does not state facts sufficient to constitute a cause of action; and *second*, that the cause of action stated is not pleadable as a counterclaim to the action. This appeal was taken by the plaintiffs from an order overruling the demurrer.

The cause was submitted on the brief of *Benj. K. Miller, Jr.*, for the appellants, and that of *Cotzhausen, Sylvester & Scheiber*, with *Geo. L. Jones*, of counsel, for the respondent *Bartels*.

LYON, J. The averments in the amended answer of the defendant *Bartels* in respect to the copartnership of the defendants are somewhat peculiar, but they may fairly be construed as an admission by the defendant *Bartels*, for the purposes of

Elliott and another vs. Espenhain and another.

this action, that when the goods mentioned in the complaint and counterclaim were sold and delivered, or agreed to be delivered, the defendants were copartners. The pleading is somewhat analogous to one of the forms of confession in criminal cases sanctioned by the common law. Says Jacobs (Law Dict., tit. "Confession"): "There is a confession indirectly implied as well as directly expressed in criminal cases; as if the defendant, in a case not capital, doth not directly own himself guilty of the crime, but, by submitting to a fine, owns his guilt; whereupon the judge may accept his submission to the king's mercy." In other words, on such implied confession the judge may proceed to judgment. The advantage of such a plea seems to have been (for in practice it has become obsolete), that it did not preclude the defendant from controverting his guilt in a civil action brought against him for the same matter, while a plea of guilty would estop him to assert his innocence. Probably this form of answer was adopted in this case for a similar purpose; that is, to save beyond question the right of the defendant *Bartels* to deny the copartnership in other actions which might be brought against the alleged firm. But, however that may be, we are clearly of the opinion that the answer distinctly waives any issue of copartnership, and for the purposes of the case admits that the defendants are copartners as alleged in the complaint; hence, so far as they affect this case, the averments in the amended answer concerning such copartnership might as well have been omitted from the pleading.

It is assumed in the brief of the learned counsel for the plaintiff, that the counterclaim shows on its face that it is for a demand due the defendant *Espenhain* alone, and hence that it cannot be interposed in this action against the firm. The conclusion from the premise is doubtless correct, but we think the pleading does not support the premise. True, it is alleged that the contract to deliver goods, the breach of which is the

Yorton vs. The Milwaukee, Lake Shore & Western R'y Co.

foundation of the counterclaim, was made by and with *Espenhain*; but the counterclaim is for damages resulting from such breach which it is alleged accrued to both defendants in case they are adjudged to be copartners. It being now adjudged on the pleadings that, for the purposes of the case, they are copartners, the counterclaim is for damages accruing to both, and hence the proper subject matter of a counterclaim in an action on contract against the firm. This being so, there seems to be no doubt of the right of either partner, answering separately, to interpose such counterclaim.

We conclude that the demurrer to the counterclaim was properly overruled.

By the Court.— Order affirmed.

YORTON VS. MILWAUKEE, LAKE SHORE & WESTERN RAILWAY
COMPANY.

January 14—February 7, 1882.

RAILROADS. *Stop-over tickets: Rights of carrier and passenger in respect thereto.*

1. A regulation by a railway company, by which one who has paid his fare between two points on the road, but desires to stop over at an intermediate point, is required to procure a stop-over ticket from the conductor, and present it to the conductor of the train on which he seeks to complete his journey, as evidence of his right to do so without further payment, is a reasonable regulation.
2. If the passenger, in such a case, asks the proper conductor for a stop-over ticket, and, through the conductor's fault, receives instead thereof only a trip check, the second conductor may still demand of him the additional fare, and, upon his refusal to pay it, may eject him from the train at some usual stopping place, using no unnecessary force; and such ejection will be no ground of recovery against the company, though such company will be liable to the passenger for the fault of the first conductor.

Yorton vs. The Milwaukee, Lake Shore & Western R'y Co.

APPEAL from the County Court of *Milwaukee* County.

Action for an alleged illegal ejection of the plaintiff from one of defendant's trains, upon which he was riding as a passenger. The grounds of the action and of the defense, and the errors alleged by the appellant, will sufficiently appear from the opinion. The plaintiff had a verdict for \$1,000 damages; a new trial was refused; and defendant appealed from a judgment on the verdict.

For the appellant there was a brief by *Cottrill, Cary & Hanson*, and oral argument by *Mr. Cottrill*.

For the respondent there was a brief by *E. P. Smith and Nath. Pereles & Sons*, and oral argument by *Mr. Smith*. To the point that plaintiff was entitled to his passage to Oshkosh upon the train from which he was ejected, that his ejection was therefore unlawful, and that the company could not justify it by his want of a stop-over ticket, which was itself a result of the fault of their own agent, they cited *Burnham v. Railway Co.*, 63 Me., 298; *Townsend v. N. Y. C. & H. R. Railroad Co.*, 4 Hun, 217; *English v. Del. & H. Canal Co.*, 66 N. Y., 454; *Hamilton v. Third Ave. Railroad Co.*, 53 id., 25; *English v. Canal Co.*, 4 Hun, 683; *Toledo, W. & W. Railway Co. v. McDonough*, 53 Ind., 289; *Palmer v. Railroad*, 3 Rich., N. S., 580; *Graham v. Pacific Railroad Co.*, 66 Mo., 536; *Du Laurans v. Railroad Co.*, 15 Minn., 49; *Pitts., C. & C. Railroad Co. v. Hennigh*, 39 Ind., 509; *Frederick v. Railroad Co.*, 5 Cent. L. J., 476; *Bennett v. Railroad Co.*, 5 Hun, 599; *Downs v. Railroad Co.*, 36 Conn., 287; *Chicago, B. & Q. Railroad Co. v. Griffin*, 68 Ill., 499; *Pullman Palace Car Co. v. Reed*, 75 id., 125; *Shelton v. Railway Co.*, 29 Ohio St., 214; *McClure v. Railroad Co.*, 34 Md., 532; 27 Md., 277; Hutchinson on Carriers, secs. 573-75. To the point that plaintiff was not guilty of negligence affecting his rights in failing to read the ticket given him by the first conductor as a stop-over ticket, they cited *Palmer v. Railroad*, 3 Rich., 580; *Brown v. C., M. & St. P. Railway Co.* (here-

Yorton vs. The Milwaukee, Lake Shore & Western R'y Co.

inafter reported); *Blossom v. Dodd*, 43 N. Y., 265; *Rawson v. Railroad Co.*, 48 id., 216, 217.

COLE, C. J. It is an admitted fact that the plaintiff purchased a ticket at Marion for transportation over the defendant's road to Oshkosh, and took the train at the former place. For the purposes of this appeal, it is assumed that he delivered that ticket to the first conductor, Sherman, and asked for a stop-over ticket at Clintonville, an intermediate station, and that through the fault or mistake of the conductor he received a trip or train check instead of a stop-over ticket, which he asked for, and which the conductor undertook to give him. It may further be assumed that he was not bound to read the check, and was guilty of no negligence in not reading it (though it would certainly have notified him that it only entitled him to ride on that train), and then calling the attention of the conductor to the mistake he had made.

These facts being assumed in the plaintiff's favor, we may further assume that his account of the circumstances attending his ejection from the train is, in the main, correct. He says, in substance, that the next morning, when he took another train at Clintonville, under charge of another conductor, when asked for his ticket, he presented the check which Sherman had given him. The second conductor properly told him that he could not ride on his train on that check; that it was only good with Sherman; and that he must either pay his fare to Oshkosh or leave the train. This was said to the plaintiff while upon the cars at Clintonville, before the train started, and while he had ample opportunity to leave the train. Indeed, the plaintiff testified that this same conversation was repeated before the train started from Clintonville, the conductor all the time telling him that the check gave him no right to ride on his train, and that he must either pay his fare or leave the train, while he asserted his right to go on that train, because he had once paid his fare. Thus the mat-

Yorton vs. The Milwaukee, Lake Shore & Western R'y Co.

ter stood when the train left Clintonville, the plaintiff remaining on the cars; and, as the train approached the next station, upon his fare being again demanded by the conductor, and refused, he was forcibly ejected from the train at the Bear Creek station, more than six miles from Clintonville. He was left at the station at about 3:30 o'clock in the morning on the 28th of October; the depot was closed, and he was unable to obtain shelter; he was exposed to cold, damp winds, contracted a violent cold, and became sick. This exposure and sickness resulting from being ejected from the train at the time and in the manner he was, constituted his principal claim for damages.

On the question of damages the learned county court charged the jury that, if they found the facts relating to the purchase and surrender of the ticket by the plaintiff, and his expulsion from the train, to be as detailed by the plaintiff's witness, then the plaintiff was entitled to recover full compensatory damages for the defendant's acts; that in assessing such damages the plaintiff was entitled to recover not only for the mere pecuniary loss and expense, loss of time, and inability to attend to his business, directly resulting from said acts, but also for bodily suffering, mental pain and disquietude, and the sense of injury and humiliation felt from the indignity inflicted in being so unjustly expelled from the cars; that this would include all bodily ailments, lameness, suffering and fatigue resulting from his being so ejected, or from the exposure to the weather in the night; that in considering the question of damages the jury might take into account the manner and time of the plaintiff being ejected from the cars, the situation and surroundings of the place where he was so ejected, and all circumstances which had been shown going to aggravate the injury, and assess full damages therefor.

This is the substance of the charge on the question of damages, and it manifestly goes upon the hypothesis that the plaintiff had a right to ride upon the train on the facts detailed

Yorton vs. The Milwaukee, Lake Shore & Western R'y Co.

by him, and that his expulsion therefrom was unlawful. In this view we think the learned county court erred. The learned counsel for the defendant insists that no claim for any damages whatever was shown or established. He says the ticket first bought was for a continuous passage from Marion to Oshkosh, and that, as the plaintiff voluntarily left the train at Clintonville, the company was under no obligation to give him a stop-over check or transport him on another train. But the conductor, Sherman, testified that he was accustomed to give these stop-over checks when requested by passengers, and he was doubtless authorized to give them. The reason why he did not give one to the plaintiff when he took up his through ticket, he says, was because the plaintiff did not ask for one, being then uncertain whether he would stop at Clintonville or not; consequently he gave him a trip or train check only. This was Sherman's understanding in the matter, and a stop-over check was not given because it was not asked for, and not for the reason that it was unusual to give them. Without attempting to settle the conflict in the testimony upon this point, we assume that a stop-over check was asked for by the plaintiff when he surrendered his ticket, and that it was the conductor's fault that he did not receive one. Then the question arises, Was the plaintiff entitled to ride on a subsequent train, not having a proper stop-over check, or was the second conductor justified under the circumstances in putting him off the train when he refused to pay his fare? The court below held that a rule or regulation of a railway company requiring passengers who ride upon its trains to procure from the conductor, or person in charge of the train, a stop-over check if they desire to stop before concluding their journey or before reaching the point to which they have purchased a ticket, is a reasonable rule and binding on passengers riding on its trains. The correctness of this proposition is hardly debatable. Now it is practically conceded that the defendant company had such a rule or regulation for the guidance of its conduct-

Yorton vs. The Milwaukee, Lake Shore & Western R'y Co.

ors. If it had, it would necessarily follow that it was the clear duty of the second conductor to obey and enforce the rule or regulation. Consequently he was perfectly justifiable in ejecting the plaintiff from his train when plaintiff had no proper voucher, produced no sufficient evidence of his right to ride thereon and refused to pay fare, and he himself was ignorant of the transaction between the plaintiff and the conductor Sherman. It seems to us there was no other course for him to pursue under the rules of the company, for he was certainly not bound to take the plaintiff's word that he had paid his fare, and that Sherman had made a mistake in not giving him a stop-over check.

It is apparent that the right of the plaintiff to ride on the train without a proper voucher, and the right of the second conductor to eject him for want of said voucher, were inconsistent rights, which could not co-exist at the same time. Therefore, under the rule of the company, the second conductor was clearly authorized and required to put the plaintiff off his train when he refused to pay fare, using no more violence than was necessary to accomplish his object; for the plaintiff had no right to remain on the train without a proper voucher, or producing some evidence showing he was entitled to carriage on that train without paying additional fare. Suppose the plaintiff had received from Sherman, when he surrendered his ticket, the proper stop-over check, but had lost it before he took the subsequent train: could he have insisted in that case upon riding on a train with another conductor without paying fare? It seems to us he could not. It would be the duty of the second conductor, in the case supposed, on his refusing to pay fare, to eject him from the train at some usual stopping place, using no unnecessary force. So, here, the plaintiff was not entitled, upon anything he showed the second conductor, to ride on his train. That conductor, therefore, had the lawful right to eject him from it; nay, he was bound to do so, in obedience to the reasonable rules of the company

Yorton vs. The Milwaukee, Lake Shore & Western R'y Co.

which required a passenger to obtain from his conductor a stop-over check when he desired to stop before reaching the place to which he had purchased a ticket; and the mistake or fault of the conductor in not giving him, on request, such a check, would not give him a lawful right to ride on the second train, though he might recover damages against the company for the wrongful act of the first conductor. *Townsend v. N. Y. C. & H. R. Railroad*, 56 N. Y., 295; *Chicago, etc., Railroad Co. v. Griffin*, 68 Ill., 499.

The case of *Townsend v. Railroad*, *supra*, is quite in point on the question we are considering. There the plaintiff purchased a ticket at the Sing Sing station for Rhinebeck, but took a train going no further north than Poughkeepsie. The conductor on the train called for tickets, and the plaintiff handed him his ticket, receiving back no check or other evidence showing a right to a passage on any other train of the defendant; nor did the plaintiff ask for a return of his ticket, or for any such evidence. He left the train at Poughkeepsie, where it stopped, and waited until another train arrived from New York going to Albany, which he took. After the train started, "the conductor called upon him for his ticket, in reply to which the plaintiff told him that he had purchased a ticket from Sing Sing to Rhinebeck, which the conductor of the other train had not given back to him. Some of the passengers told the conductor that the plaintiff had such a ticket. The conductor told the plaintiff that it was his duty, in case he had no ticket, to collect the fare, and that the other conductor would make it right with him. The plaintiff refused to pay fare, and the conductor told him he must leave the train. This the plaintiff refused to do, insisting upon his right to a passage to Rhinebeck upon the ticket which the conductor of the other train had taken. Upon the arrival of the train at Staatsburg, a regular station, the plaintiff, still refusing to pay fare or to leave the train upon request, was taken hold of, and such force used as was necessary to overcome his

Yorton vs. The Milwaukee, Lake Shore & Western R'y Co.

resistance, and ejected from the car." The court held that he was lawfully put off the train, notwithstanding the wrongful act of the previous conductor in taking his ticket. The case is well considered, and the opinion of Judge GROVER is very instructive. Substantially the same doctrine as to the rights and duties of passengers and carriers is laid down in *Shelton v. Railway Co.*, 29 Ohio St., 214; *Downs v. Railroad Co.*, 36 Conn., 287; and *McClure v. Railroad Co.*, 34 Md., 532. The cases of *Toledo, W. & W. Railway Co. v. McDonough*, 53 Ind., 289; *Burnham v. Railway Co.*, 63 Me., 298; *Palmer v. Railroad*, 3 Rich. (S. C.), 580; *Hamilton v. Railroad Co.*, 53 N. Y., 25; and *English v. Canal Co.*, 66 N. Y., 454, are clearly distinguishable from the case before us.

Putting the plaintiff off the train, then, at Bear Creek station was not an unlawful act. It was what the second conductor was bound to do in the discharge of his duty to the company. It is true, as a consequence of being ejected at that place, at that time, in the night, he contracted a violent cold and became sick. But this exposure he really brought upon himself by his own conduct. Why, then, should he complain about it? He was distinctly told at Clintonville that he could not ride on the train unless he paid his fare. He had an ample opportunity to leave the train at that place. But he persistently refused either to leave the train or pay his fare, preferring to take his chances upon being put off at some subsequent station. He was told by the conductor that he would be put off at the next station unless he paid his fare. He might not have been familiar with the surroundings at Bear Creek station, but he certainly knew he would be put off, probably in the night-time. The weather was cold, and he was liable to be exposed on leaving the train. All these things he knew or should have known, but he chose to remain on the train and abide the consequences. Under the circumstances he ought not to recover damages for any exposure or sickness which he brought upon himself by his own foolish and per-

Tetz vs. Butterfield.

verse conduct. For, as we have said, he was not entitled to a passage on that train, and was rightfully removed therefrom.

We are not called upon, on this appeal, to determine definitely what damages the plaintiff is entitled to recover for the wrongful act of the first conductor. It will be in time to consider that question when it shall properly arise. We now only intend to decide that the charge of the county court before referred to, which directed the jury, in the event they found in favor of the plaintiff, that they should assess damages for injuries arising from sickness, exposure or bodily suffering which resulted from his being justly expelled from the train at Bear Creek station, was erroneous. For the reasons given, the plaintiff was not entitled to recover any damages on that ground. The other exceptions taken to instructions given, or refusals to give instructions, need not be considered.

By the Court.—The judgment of the county court is reversed, and a new trial ordered.

TETZ VS. BUTTERFIELD.

January 14—February 7, 1882.

CONTRACTS. (1) *Building contract construed.* (2) *Bad faith in umpire between parties to such contract.*

1. A contract for the erection of a dwelling by T. for B., provides that T. shall complete it in all its parts "in a good, substantial and workmanlike manner, to the acceptance of W. D., architect;" that if a dispute shall arise respecting the true construction of the drawings or specifications, the same shall be finally decided by the architect, but if any dispute shall arise respecting the true value of any extra work, or of work omitted, "the same shall be valued" by arbitrators, whose appointment is provided for; and that the work is to be executed "so as to fully carry out the design for said building as set forth in the specifications or shown on the plans, and according to the true spirit, meaning and intent thereof, and to the full satisfaction of W. D., architect, . . . and to the satisfaction of the owner." *Held*, that the last provision has no refer-

Tetz vs. Butterfield.

- ence to the quality of the workmanship or materials, and as to these, in the absence of proof of fraud, mistake or unfair dealing on the part of the architect, his acceptance of the work as satisfactory binds the owner.
2. In an action by the builder upon the contract, the answer alleges that improper and inferior material was used by the plaintiff; and that if the architect "has expressed satisfaction with said work, he has failed to discharge his duty as an architect, and has done so in fraud of the rights of defendant, and through some collusive arrangement, as defendant is informed and believes, between himself and the plaintiff." On the trial, defendant offered evidence to show that one of the floors was made of rotten flooring, and that much of the material used was rotten, etc., and that before plaintiff quit work, defendant notified him and the architect that he (defendant) was not satisfied with the work and material. *Held*, that it was error to reject this evidence, as it tended to show *bad faith* on the part of the architect in accepting the building, and such proof was admissible under the contract and answer.

APPEAL from the Circuit Court for *Milwaukee* County.

The case is thus stated by Mr. Justice TAYLOR:

"This action was brought to recover a balance alleged to be due to the plaintiff on a written contract for building a house for the defendant, and for extra work done on such house, not included in the contract, and to enforce a lien upon the building, etc., for the amount found due the plaintiff. The defendant answers, admitting that the work was done under a written contract and specifications, which he makes a part of his answer, and then denies that the work was done according to the terms thereof, alleging that the work was done unskillfully, and that improper and inferior material was used by the plaintiff; 'that he has no knowledge or information sufficient to form a belief as to whether the said work was done under the direction of William Davelaar, architect, and to his acceptance, or whether it was done to the complete satisfaction of said architect, Davelaar; and that if the said Davelaar has expressed satisfaction with said work he has failed to discharge his duty as architect, and has done so in fraud of the rights of this defendant, and by and through some collusive arrangement, as this defendant is informed and believes, between himself and the said plaintiff.'

Tetz vs. Butterfield.

"As to the extra work for which plaintiff claims compensation, the answer denies his right to recover for one charge of \$40, because he says it was done as compensation for or in place of other work required to be done by the terms of the contract; and as to several other charges for such work he denies that the work was worth the price charged therefor by the plaintiff. He then, by way of counterclaim, specifies the particulars in which the plaintiff has failed to perform his contract, and alleges that he was damaged by such failure in several amounts set out in such counterclaim, and claims damage to the amount in all of \$1,500. The pleadings are too voluminous to be set out at length in this opinion. What is above stated is sufficient, perhaps, to present the questions to be determined on this appeal.

"The parts of the contract necessary to an understanding of the questions to be determined, are the following: 'The party of the first part agrees to complete the said dwelling, in all its several parts, in a good, substantial and workmanlike manner, to the acceptance of William Davelaar, architect, on or before the first day of May, 1880, for the sum of \$1,850. . . . And further, should any dispute arise respecting the true construction of the drawings or specifications, the same shall be decided by the architect, and his decision shall be final and conclusive; but should any dispute arise respecting the true value of any extra work, or of work omitted, the same shall be valued by two competent persons, one employed by the owner and the other by the contractor; and these two shall have power to name an umpire, whose decision shall be binding on all parties.' 'No extra work charged unless agreed upon.' 'And further, that the said work is to be executed so as to fully carry out the design for said building as set forth in the specifications or shown on the plans, and according to the true spirit, meaning and intent thereof, and to the full and complete satisfaction of William Davelaar, architect, who is hereby declared to be the superintendent of said building, and to the satisfaction of the owner.' The last paragraph quoted is the last of the contract,

Tetz vs. Butterfield.

and the words 'and to the satisfaction of the owner' are in writing; all the other parts of said last paragraph are printed.

"Upon the trial plaintiff gave evidence in support of his claim, and proved by Davelaar that he had accepted the work as completed under the contract. He says he thinks it was a fair job, and was done all right. He also says the defendant suggested some changes, and gave him a list of the defects in the house and materials. 'It was a long list, and he told me to give it to the plaintiff.' After the plaintiff rested his case, the defendant offered evidence tending to show that one of the floors of the house had been made of rotten flooring. He also offered to show that much of the material used was rotten; that the roof was leaky; and other evidence tending to prove the allegations set out in his answer and counterclaim. He also offered to show that, before the plaintiff quit work on the building, he notified the plaintiff and the architect, Davelaar, that he was not satisfied with the work and material, and that he was damaged in the particulars mentioned in the answer.

"The circuit court excluded all evidence offered by the defendant, on the ground that the defendant was not entitled, under the pleadings, to introduce any evidence, because it appeared in evidence that the architect, who was made the arbiter between the parties, accepted the work as done in accordance with the plans and specifications, and there is no allegation in the answer charging that it was done through fraud or mistake."

Plaintiff had a verdict and judgment, and defendant appealed.

Geo. B. Goodwin, for the appellant.

The cause was submitted for the respondent on the brief of *Austin & Runkel*.

TAYLOR, J. The material questions to be determined upon this appeal are — *first*, whether, under the contract, in the absence of any proof of fraud, mistake or unfair dealing on the

Tetz vs. Butterfield.

part of the architect, Davelaar, his acceptance of the work as completed in accordance with the terms of the contract would bind the defendant; and *second*, whether the answer sets up facts which would entitle the defendant to show that, although there had been an acceptance of the work by the architect, such acceptance was not in good faith, but in fraud of the defendant's rights. Upon the first question, a majority of the members of this court are of the opinion that if the good faith of the acceptance of the work by the architect is not impeached, it is binding on the defendant as to the kind of workmanship done and materials furnished by the plaintiff; that the last paragraph of the contract, which requires the work to be executed so as to fully carry out the *design for said building* as set forth, etc., "to the full and complete satisfaction of the architect, Davelaar, who is declared to be superintendent, and to the satisfaction of the owner," has no reference to the quality of the work done or the materials furnished; that this provision was put in the contract only for the purpose of preventing any change of the plan or design of the building without the consent and approval of the defendant; but as to all other matters the work was to be done to the satisfaction and acceptance of Davelaar, the architect, and when so done the plaintiff would have performed his contract, unless it be shown that there was fraud, mistake or want of good faith on the part of the architect in accepting such work.

Upon the second point, we are all of the opinion that the matters set out in the answer were sufficient to authorize the defendant to show there had been either fraud, collusion or bad faith on the part of the architect in accepting the work; and that if he had been able to establish by his evidence the facts set out in his answer, such evidence would have tended to establish at least bad faith on the part of the architect, and so would have avoided the conclusive effect of his acceptance of the work. If the defendant could have shown by his evidence that the plaintiff put rotten materials in the floors and roof of

Tetz vs. Butterfield.

said building, where the contract required him to put in good, sound timber and materials, or that he had done other things alleged in the answer in direct contravention of the requirements of the contract, and that, notwithstanding such facts, the architect had accepted the work, after being informed of the facts by the defendant, and against his objection, it seems to us that it would be competent evidence to go to the jury on the question of the bad faith of the architect in accepting the same.

In the case of *Hudson v. McCartney*, 33 Wis., 331, the late Chief Justice Dixon says: "Neither do we think the case was one where the jury should have been permitted to go into evidence of the manner in which the work was executed, for the purpose of impeaching the decision of the superintendent;" but, he adds, "if fraud in the arbiter can ever be established by proof that he refused to certify the execution of the work when the same had been duly and properly performed, it can only be in those cases where the refusal is shown to have been grossly and palpably perverse, oppressive and unjust — so much so that the inference of bad faith and dishonesty would at once arise when the facts are known." The evidence offered by the defendant in this case, if given, would have tended to prove such a state of facts as would, at least, have justified an inference of bad faith on the part of the architect in accepting the work. Knowingly accepting unsound and rotten materials, where the contract called for sound materials, would certainly tend to prove bad faith; and if the evidence had shown that he had permitted large quantities of such material to be used, when the contract called for sound and perfect materials, it would be almost conclusive evidence of that fact. Proof that a few pieces of imperfect material had been used, or that in some slight matters the workmanship had not been in strict accordance with the terms of the contract and specifications, would not be sufficient to avoid the acceptance of the work by the architect, nor establish bad faith on his part; but it seems

Rice vs. Jerenson.

to us, if the defendant had proved all the matters set out in his answer to their full extent, it would have shown such a want of faithfulness on the part of the architect as should render his acts ineffectual to bind the defendant. We think the court erred in excluding the evidence offered by the defendant, and for that error the judgment must be reversed.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

RICE VS. JERENSON. [Two Cases.]

January 14 — February 7, 1882.

APPEAL TO SUPREME COURT. (1) *When evidence reviewed: exceptions as to evidence disregarded.*

FRAUD. (2) *Burden of proof.* (3, 4) *When finding as to fraud reversed.*

ATTACHMENT. (5) *Judgment in personam not rendered before debt due.*

1. On appeal from an order dismissing an attachment upon trial by the court of the traverse of the affidavit, this court reviews the evidence, and therefore disregards exceptions to the admission of evidence.
2. One who impeaches a mortgage as in fraud of creditors, has the burden of showing the fraud by clear and satisfactory evidence.
3. To justify this court in reversing the finding of the court below on the issue of fraud, there should be a clear preponderance of the evidence against such finding.
4. Upon all the evidence in this case (stated in the opinion), this court declines to reverse the finding of the court below that the mortgage here in question (upon a stock of goods) was given without any fraudulent intent as to creditors, notwithstanding several facts which are grounds of suspicion and usually indications of bad faith.
- [5. The statute (ch. 233 of 1880) allowing an attachment for a debt not due does not appear to authorize judgment *in personam* against the debtor to be rendered before the debt is due.]

APPEALS from the Circuit Court for *Dodge County*.

In the first of these actions the plaintiff filed an affidavit for an attachment against the property of the defendant, which

Rice vs. Jerenson.

states in substance that the defendant is indebted to plaintiff in the sum of \$600, as near as may be, over and above all legal set-offs, and that the same is due on a promissory note owned and held by the plaintiff, executed December 10, 1880, by the defendant to the plaintiff, for \$600 and interest at ten per cent. per annum, which debt is to become due; and that plaintiff has good reason to believe and does believe that the defendant (a resident of this state) has assigned, conveyed, disposed of or concealed, or is about to assign, convey, dispose of or conceal, his property or some part thereof, with intent to defraud his creditors. The defendant's verified answer traversing said affidavit, denies that defendant "has, or had at the time of the making of said affidavit, assigned, conveyed, disposed of or concealed, or is, or was at the time of making said affidavit, about to assign, convey, dispose of or conceal, his property or any part thereof, with intent to defraud his creditors or any of them."

When this issue came on to be heard by the court, the defendant objected to such trial, on the ground that the court had no jurisdiction to try the cause; but the objection was overruled. The defendant also objected to the introduction of any evidence, on the ground that it appeared from the plaintiff's affidavit that nothing was due upon his claim when the attachment issued. This objection was also overruled. No attempt will be made to state the evidence. The court found as facts, that at the time of the making of the affidavit for an attachment, the defendant had not assigned, conveyed, disposed of or concealed his property, or any part thereof, with intent to defraud his creditors, and was not about to do so. Thereupon it ordered the writ of attachment to be dissolved, and the attached property to be delivered up by the sheriff. From that order the plaintiff appealed.

The record in the second case was similar to the first, except that it appeared that the debt for which the action was brought was already due.

Rice vs. Jerenson.

For the appellant there was a brief by *E. P. Smith* and *Nath. Pereles & Sons*, and oral argument by *Mr. Smith*.

For the respondent there was a brief by *Hurlbut & Van Alstine*, and oral argument by *Mr. Van Alstine*.

ORTON, J. Two cases of the same title were submitted together, as the only difference between them is that in one the debt was not due, and in the other it was. These appeals being from judgments dismissing attachments upon the trial by the court of the traverse of the affidavits, this court must necessarily review the evidence, and therefore the exceptions founded upon the admission of improper evidence will be disregarded. *Snyder v. Wright*, 13 Wis., 688; *Sanford v. McCree*, 28 Wis., 103; *Stewart v. Stewart*, 41 Wis., 624; *Norris v. Persons*, 49 Wis., 101.

The only question apparent upon the record is one of fact, and that practically confined to the mortgage given by the defendant to Landauer & Co. on the 21st day of April, 1881. Was that mortgage given by the defendant with intent to defraud his creditors?

It must be conceded that this mortgage was given under circumstances which might well excite suspicion, and there are some facts connected with it which, in themselves, are indications and badges of fraud, but which are not conclusive evidence of fraud, and, when considered in the light of all the evidence in the case, may be insufficient to impeach the *bona fides* of the transaction. In passing upon this question this court must have in mind two well-settled principles: *first*, that the burden of proving that this mortgage was given with intent to defraud creditors is upon the plaintiff, and to establish the fact requires clear and satisfactory evidence; *secondly*, that to justify this court in reversing the finding of the circuit judge upon such an issue, the reported evidence must be clearly preponderating against it. *Davidson v. Hackett*, 49 Wis., 186.

The learned and able circuit judge who tried this issue, had

Rice vs. Jerenson.

the benefit and advantage of a personal examination of the witnesses, and was better qualified to judge of the weight to be given to their testimony, by the usual tests of credibility, than this court can be; and his finding of the main fact ought not to be disturbed without such a clear and palpable preponderance of the evidence against it as will create a positive conviction in our minds that he erred in his conclusion. There were facts and circumstances connected with the defendant's giving this mortgage, which in themselves are strong indications and badges of fraud, as we have already said. He was obviously and grossly insolvent, by comparison of his debts with the value of his property. His main purpose in giving it was to gain time, not only upon the claim to be secured, but upon other claims against him. He was left in full possession of his store and the stock of goods mortgaged, and sold goods and consumed groceries from the stock as usual, and he denied afterwards that he had given the mortgage. The mortgage covered the whole stock, of the value of about \$5,000, to secure proportionally a small sum, and without invoice, and by a general description. The attorneys of the mortgagees evidently knew that the mortgagor was in embarrassed circumstances, and they threatened him with immediate suit, and that that portion of the goods in the store for which the debt was incurred would be taken away if he did not give the mortgage; and the goods were afterwards left in his full possession by them for about twenty days, when they knew that his object in giving the mortgage was to gain time.

There were other facts which, perhaps, cast suspicion upon the transaction, which we have not noticed. As against these indications of bad faith, and in explanation of them, it was clearly apparent that the defendant was an unskillful and careless business man, and probably did not know fully (or think of at the time) the full extent of his indebtedness, and was apparently hopeful, and unreasonably so perhaps, that if he could gain some time and have indulgence he would be able to pay his debts. He gave the mortgage with great reluctance,

and objected to giving it because it appeared to be a preference of his creditors; and he evidently was induced finally to give it because of the threat that the attorney Hurlbut would take out of his stock the goods sold him by Landauer & Co., or sue him at once. He denied positively that he had any intent or design to defraud any one in giving the mortgage, and under oath insisted that in time he could have paid his creditors, or, as he testified, he "thought he could get along." The debt to secure which the mortgage was given, was *bona fide*. There was no evidence that there was any permission on the part of the mortgagees or their attorneys for the defendant to sell the stock, or any part thereof, other than an inference from leaving it so long in his possession, and no evidence that he was permitted to use or consume any part of it in the support of his family, or that they ever knew that he had done so; and, indeed, the sales were small, and the product went to his creditors, and the consumption could not have been large. There was really no evidence that the mortgage was given as a cover of the stock of goods from other creditors, or as a sham, or for any purpose of the mortgagees or their attorneys other than to secure the debt.

The defendant testified very readily as to the manner in which he had treated the stock after giving the mortgage, and to other facts bearing against its validity, and in this as in some other disclosures, such as his motive "to gain time," etc., it is apparent that he was an inexperienced, careless, yet frank and honest man.

This brief reference to the main points of the evidence is sufficient to show that the circuit court properly found that the mortgage was not given with intent to defraud creditors, or at least to show that the evidence does not clearly preponderate against such finding. The law in respect to fraud in sales and mortgages is so well settled and so unquestionable that it would be supererogation, and an exhibition of legal pedantry, to cite authorities.

In respect to the constitutional and jurisdictional questions

Jenkins and others vs. Davis and another, imp.

raised on the argument, the decision of the main question above indicated, perhaps, renders it unnecessary to decide them; but we may intimate that we think the construction given to the act creating the new circuit, by the learned counsel of the appellant, is correct; and it does not appear, from the statute allowing an attachment upon debts not due, that judgment *in personam* against the debtor is authorized to be rendered before the debt becomes due. There may be an imperfection in the statute in not providing what shall be done with the property in the mean time, which ought to be remedied by amendment. The reference to proceedings in common actions would certainly give no authority to render judgment for a debt not due, because in no actions conceivable is there any such right given or implied.

By the Court.—The judgment of the circuit court is affirmed.

JENKINS and others vs. DAVIS and another, imp.

January 17 — February 7, 1882.

Finding supported by evidence. Estoppel.

The evidence in this case (stated in the opinion) justifies a finding that the sale of goods in question was made by plaintiffs to the defendants as copartners, and not to one of them individually; and it shows facts *estopping* all the defendants from denying that the sale was to the firm.

APPEAL from the Circuit Court for Winnebago County.

Action by *James Jenkins, O. F. Swift and J. H. Jenkins* against *C. W. Davis, David Jones* and *A. B. Crane*, for the sum of \$1,327.83, alleged to be due the plaintiffs from the defendants for "goods, wares and merchandise and personal property," sold and delivered by the former to the latter about December 21, 1872, at Oshkosh, in this state. The complaint alleges that, at the time of such sale and delivery,

Jenkins and others vs. Davis and another, imp.

the plaintiffs were partners in business under the name of J. Jenkins & Co.; that the defendants were also partners in business at the same time; and that the goods, etc., so sold and delivered, were enjoyed and used by the defendants in their partnership business. The joint answer of *Davis* and *Jones*, after a general denial, alleged that at the time mentioned in the complaint, the defendant Crane and the plaintiffs were partners in business under the name of James Jenkins & Co.; that said firm owned the property described in the complaint until the sale hereinafter mentioned; that the business of said firm had never been settled; and that on or about the 16th of December, 1875, said firm sold and delivered said property to the defendant Crane, and to no other person whatsoever. The separate answer of Crane contained the same allegations as that of his co-defendants. Each of the defendants filed his affidavit denying the alleged partnership of the defendants. The cause was tried by a referee, who found severally each of the facts alleged in the complaint, and also found that at the time of the sale in question the defendant Crane was not a partner with plaintiffs. As a conclusion of law, he held that plaintiffs were entitled to recover from the defendants the sum demanded in the complaint. The defendants *Davis* and *Jones* excepted to each of the findings of fact and to the conclusion of law; and, the referee's report having been confirmed, and judgment entered accordingly, they appealed therefrom.

For the appellants there was a brief by *C. W. Felker*, their attorney, with *W. B. Felker*, of counsel, and oral argument by *W. B. Felker*.

Gabe Bouck, for the respondents.

ORON, J. The referee was clearly warranted from the evidence in finding that the plaintiffs, the two *Jenkinses* and one *Swift*, were partners, under the name of J. Jenkins & Co., and that the defendant *Crane* was not a member of said firm, when they

Jenkins and others vs. Davis and another, imp.

owned and sold the property. The principal contention by the defendants was, that the plaintiffs sold the property to *Crane* alone, and not to the defendants *Davis*, *Crane* and *Jones*. It is insisted that at the time *Crane* purchased the property of the plaintiffs, the partnership of the defendants had not been formed, and was only in contemplation, and that *Crane* purchased this property for himself, to put into the concern as part of his stock, and he used in the business of the firm after the partnership should be formed; and that the defendants *Davis* and *Jones* did not authorize the purchase, and the firm did not become liable to pay for the same.

The evidence was somewhat conflicting, but we think it was sufficient to justify the referee in finding the main fact, that "the plaintiffs sold to the defendants the goods, wares and merchandise as alleged in the complaint." A list with the prices of the property was made out in the form of a bill, headed, "Sold by J. Jenkins & Co. to Crane, Jones & Davis," on the sixteenth day of December, and delivered to *Crane*, and *Crane* showed it to *Davis* and *Jones*, and delivered it to *Davis* about the same time. A few days before, *Davis* and *Crane* called upon the plaintiffs to ascertain the condition and value of the property as well as the prices asked; and it was then and there agreed that the property should be taken as suitable, except that some objection was made as to the groceries, because *Jones* was in the business of selling groceries; and when the property was to be made use of, the groceries were used in the family of *Crane*. *Davis* kept this bill after it was delivered to him, and no objection was ever made to the plaintiffs by either him or *Jones* as to the form in which it was made out. The account for the property, in conformity with this list or bill, was entered in the books of the plaintiffs on the 21st day of December. The property went into the concern of *Crane*, *Davis & Jones*, or *Davis*, *Crane & Jones*, at the prices named in that list. *Crane* testified that *Davis* objected to the form of the bill in respect to its being made out against the firm, and that he notified the plaintiffs thereof, and that they prom-

Jenkins and others vs. Davis and another, imp.

ised to correct it and have the goods charged to him alone; but this is positively denied by the plaintiffs.

It was in evidence that meats were purchased from one Wakeman and charged to the firm between the 20th and 24th of December, and that both *Davis* and *Jones* inspected the meats before the purchase, and they were afterwards paid for by the firm; that on the 17th and 18th of December the horses, which constituted a part of the purchase, were shod by one Sanford, a blacksmith; and that about that time several articles of hardware were purchased by the firm of Sanford, and both the shoeing and these articles were charged to the firm, and afterwards paid for by the firm. The defendants do not agree in their testimony as to the day when the partnership was formed. *Crane* fixes it on the 26th of December; *Davis* and *Jones* on the 23d or 24th. All the property except the groceries went into the use of the firm, and the firm, when they had finished their business of getting out logs, sold it to *Crane*; but *Crane* testified that he sold it to the firm after he bought it of the plaintiffs. The plaintiffs testified positively that they sold the property to and solely on the credit of the firm, and that they would not have sold it to *Crane* alone, because he was irresponsible.

These facts strongly tend to show that the partnership of the defendants was formed before this purchase was made, and that the defendants had held themselves out to the plaintiffs, and to others, as a partnership before such purchase, and that they jointly purchased the property, and acquiesced in the form and manner in which it was charged to the firm; and it would seem that they should be estopped from now denying that they purchased the property. The law upon the subject is unquestionable. *Parsons* on Part., 134; *Kelleher v. Tisdale*, 23 Ill., 405; *Gilpin v. Temple*, 4 Harr. (Del.), 190; *Robinson v. Green*, 5 id., 115; *Rippey v. Evans*, 22 Mo., 157; *Welsh v. Speakman*, 8 W. & S., 257.

By the Court.—The judgment of the circuit court is affirmed.

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

**BALLOU, Administratrix, vs. THE CHICAGO, MILWAUKEE &
ST. PAUL RAILWAY COMPANY.**

January 18 — February 7, 1882.

RAILROADS. *Negligence of one company in respect to construction of freight cars of other companies used on its road.*

1. In an action against a railway company (under sec. 1816, R. S.), for injuries to an employee, where the whole evidence shows beyond dispute that the sole cause of the injuries was the use of one bolt of insufficient length in fastening a slat of the ladder of a freight car, together with the somewhat decayed condition of the wood at the place of such bolt, and that there was no external indication of these defects, and the person injured had been frequently in charge of the same car and in the habit of using the same ladder — there was no error in directing a nonsuit.
 2. One railroad company receiving a loaded car from another, and running it upon its own road, is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which *appear* to be in good condition, are so in fact.
- TAYLOR, J., dissents from the judgment.

APPEAL from the Circuit Court for *Winnebago* County.

Action for injuries to plaintiff's intestate, causing his death.
The case is thus stated by Mr. Justice CASSIDAY:

"At the time of his death, the intestate was employed as brakeman on a regular freight train of the defendant, run between Oshkosh and Fort Howard, under the conductorship of one Sykes, and had been in such employ for three years. On the day previous to his death, freight car No. 57, belonging to the Green Bay & Minnesota Railroad Company, was taken by the train upon which the deceased was employed, from that company at Fort Howard Junction, loaded with charcoal, and drawn to Fort Howard, and from there it was taken in the train, on the return trip, to Depere, to which place it was consigned, and was there left. On the return of this train from Oshkosh the next day, it stopped at Depere, and,

VOL. LIV — 17

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

leaving the larger part of the train on the main track, the engine No. 29 and tender passed onto the side track or switch, and the deceased hitched this car No. 57 to the front of the engine, and then the engine backed out onto the main track and started to get another car, going up to near Bolles' side track with No. 57 attached, and the deceased riding upon the top of it, when it stopped, and the deceased climbed down the ladder at the north end of this No. 57 (being the forward end) and, turning the switch, gave the ordinary signal with his hand to the engineer to go ahead, and said, 'Go ahead, Fred!' which he did; and then while the engine, together with this car No. 57, was moving at the rate of two or three miles an hour, the deceased, being upon the ground, seized one of the rounds of this same ladder with his left hand, and then reached another round with his right hand, and, giving a spring, struck the bumper with his left foot, when one of the slats or rounds of the ladder, about seven feet from the ground, which he had hold of, gave way, and he fell backward upon the track, and car No. 57 ran over him, and killed him instantly. The distance between the place where the car stood when the signal was given, and the place to which it was going to get the other car, was some eight or ten rods, and the surface of the ground in the space between was level, except the tracks, and there was no difficulty in walking over it.

"The slat or round which gave way was about three feet long, two inches wide, and one inch and a quarter thick at one end, and one inch and three-eighths at the other end, and was made of oak timber. The ladder consisted of four slats or rounds of this size, fastened at each end with screw bolts, to oak stanchions standing upright near the middle of the end of the car, and forming a part of the end of the car, as timbers or studding, the lower ends being in stake holes, as it had previously been a flat car. The bolts were three-eighths or seven-sixteenths of an inch thick; and the one that came out only passed into the stanchion about one-half of an inch of the threads,

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

whereas it should have passed in to the extent of one and a half or two inches. The bolt did not break, but pulled out of the stanchion, with the threads of the screw filled with the wood. A small portion of the stanchion, at the place where the screw went in, was decayed, and another hole indicated that a screw had previously broken off. This decay near the screw, and the hole, were concealed from observation by the slat or round while the same was in place and before it gave way. The same train, with the same brakeman, had been in the habit of handling this same car, No. 57, once or twice a week during the year previous. The accident occurred between three and four o'clock in the afternoon of 'a nice, bright day.' The brake on car No. 57 was at the top of the car, near the ladder in question; but there was nothing requiring the deceased to get upon the car, as he could easily walk the short distance necessary to couple on the other car.

"The deceased had frequently ascended and descended the ladder in question, and others on other coal cars of the Green Bay & Minnesota road, constructed the same way as this, and having the same general appearance, and was familiar with the car and the ladder. The train on which the deceased was so employed had for a long time been in the habit of handling almost daily other foreign cars having ladders at the end, including cars from the Baltimore & Ohio Railroad, the Lake Shore & Michigan Southern, the New York Central, the Hudson River, the Grand Trunk, the Pittsburgh & Fort Wayne, the Chicago, Rock Island & Pacific, and other railroads; and no injury had previously been known to occur from such ladders or from any defect in such ladders.

"At the close of the testimony on the part of the plaintiff, the defendant moved for a nonsuit on the ground that it appeared by the testimony of every witness that when the ladder, slat or round was screwed upon the stanchion, no person looking at the head of the bolt, seeing it in the position in which it was, would have supposed, or been charged with any reason to sup-

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

pose, that it was different from what it appeared to be, and from what ladders of a similar description, bolted in a similar manner to that, would be presumed to be. The court granted the motion substantially upon the grounds stated, and in doing so the trial judge, among other things, said: 'I understand the testimony of the plaintiff [to be] that the defect which caused this injury was the drawing out of the screws which held the rung upon the stanchion. All the witnesses agree that substantially there was nothing externally that would indicate that the bolt was not of the ordinary depth or length that is used in such places, to wit, three inches to three and a half; that the head would indicate the diameter. All that have said anything upon the subject have given the opinion, and all the experts, that had the bolt been of such a length as is usual in such places, it would not have pulled out, in their judgment. Clearly and fairly, that being so, the evidence to me shows conclusively that no degree of care that the railroad would be called upon to exercise would have discovered the defect, to wit, the drawing out of the bolt.' From the judgment of nonsuit thereupon entered, the plaintiff appealed.

Gabe Bouck, for the appellant.

For the respondent there was a brief by *William F. Vilas*, its attorney, with *C. W. Felker*, of counsel, and oral argument by *Mr. Vilas*.

CASSODAY, J. The gist of the complaint is, that the intestate came to his death by the wrongful act, negligence and default of the defendant, and without any fault, carelessness or negligence on his part. The cause of action accrued prior to the repeal of section 1816, R. S., and was expressly saved by the repealing act (chapter 232, Laws of 1880), and hence must be governed by that section. The intestate was, at the time he was killed, a servant of the defendant, and the only question to be determined is, whether his death was caused by reason of the negligence of any other agent or servant of the defend-

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

ant, without contributory negligence on the part of the deceased. *Gumz v. Railway Co.*, 52 Wis., 676. Clearly, under that section, the burden was upon the plaintiff of proving that such death was by reason of the negligence of some "other agent or servant" of the defendant. There is no claim of any negligence on the part of the conductor of the train. There is no claim that the engineer was negligent in starting the engine and car, and running them in the manner and with the speed he did. On the contrary the evidence is undisputed that he started them in pursuance of the signal and command of the deceased. Manifestly the only defect which at all contributed to the injury was the shortness of the bolt fastening the slat or round in question to the standard or stanchion.

Was the defendant guilty of negligence by taking that car loaded with charcoal from another railroad and handling it as it did? A very careful reading and rereading of the printed case forces upon us the conviction that the learned circuit judge's summary of the evidence above given, as to the defendant's negligence, is substantially correct. It is true, the evidence tended to show that the heads of such bolts indicate their size, and that the head of the bolt in question indicated that it was three-eighths or seven-sixteenths of an inch thick, whereas such bolts were ordinarily one-half an inch thick. But the difference was very slight, and, as stated by the trial judge, there was no breakage of the bolt, but it pulled out solely by reason of being too short, and hence not having penetrated the stanchion to a sufficient depth. From the evidence it is clear that had the penetration been of sufficient depth it would not have broken nor pulled out. It is true that one of the witnesses, who had once been discharged from the defendant's employ, and testified with an apparent bias, did say, in one portion of his testimony, that the head of the bolt indicated that it was too short; but after a rigid cross examination he was compelled, reluctantly, to admit, what all the other witnesses most clearly state, and what reason fully corroborates,

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

and that is, that no one could tell from simply looking at the head of the bolt what its length was.

It is true, one of the witnesses states that he examined the other rounds in the ladder on this car, and the bolts, and that they seemed to be half-inch bolts. It does not appear, however, that the heads of such other bolts were any larger than the one in question. On the contrary, it was stated on the argument, without any dissent, that the evidence indicated that the heads of the bolts were apparently alike. This we assume to be correct, especially as it was stated without contradiction that much of the evidence was not printed. But even if there was a slight difference in the size of the heads, indicating one-eighth or one-sixteenth of an inch difference in the size of the bolts, yet, since it is clear from the evidence that the injury did not result from insufficiency in size, it would seem to be immaterial. It is true, as urged by the learned counsel for the plaintiff, that there was some discoloration on the stanchion just below the slat or round in question, and immediately under the place where the bolt in question penetrated the same, caused by water and rust passing down between the slat or round and the stanchion. But, from the evidence, such discoloration seems to be quite common, and does not necessarily imply rot or substantial decay. The car was rough, and so was the use to which it was put; but roughness in appearance does not necessarily imply want of strength.

Had the conductor, or any other agent or servant of the defendant, prior to the injury, known of the shortness of the bolt, and the condition of that part of the stanchion directly under the slat or round, as they were revealed on examination after it came off, then such use after such knowledge would have been negligence within the meaning of the statute; and in such case, if the deceased was free from contributory negligence, there would be no question but that the plaintiff could recover. But the evidence fails to show that any agent or servant of the defendant had any such knowledge, or any knowl-

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

edge, of any condition of the ladder or car, perceivable to the eye, which would naturally induce a man of ordinary skill in such matters, in the exercise of ordinary care, to discover the precise defect which led to the injury. Of course, it was discoverable by taking out the bolts and looking beneath the slats or rounds. So the sufficiency of the bolts, as to length as well as size, might have been determined by the application of a heavy weight, or by a strong man, or some machine, wrenching the same. Assuming that some such test should have been applied, the questions would remain, when, by whom, and how frequently? If properly tested by the manufacturer, then is it to be repeated by the purchaser and every one who uses the same? and if so, shall he go beyond ordinary inspection, while at rest or in use, to the extent of unmaking what has already been made?

There is much propriety in the law exacting rigid tests to the different parts in the first instance, and while a car is in the process of manufacture, which would be impracticable, if not impossible, to repeat every time a loaded car passed from one railway company to another. Is one railroad company, receiving a loaded car from another railroad company, bound to assume that such car was not properly made; that the materials used in its construction were unsuitable or defective; that the workmanship was unskillful? Or may the company so receiving properly assume that such loaded car was skillfully made of suitable materials, and that all the requisite tests in the manufacture of such car had been applied? Is the company so receiving bound not only to use such care as is required of those handling and drawing such car, but also such care as is required of the manufacturer in the selection of materials, the application of tests, and the exercise of skill in the building? May not the company so receiving such loaded car, and without being chargeable with negligence, assume that all parts of such car which appear to be in good condition are in such condition? Is the law so exacting as to the

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

management of railroad trains as to impute negligence in not discovering what ordinary care would fail to detect? Is the law so stringent in such a case as to infer negligence without any omission of duty? Reference to the authorities may aid us in the solution of some of these questions.

In *Wedgwood v. Railway Co.*, 41 Wis., 478, the brakeman was injured while coupling freight cars by a large and long bolt being out of place, and, as alleged, unnecessarily projecting. It was there held that "a master is liable for injuries suffered by his servant, where, by his own *negligence* or *malfeasance*, he has *enhanced* the risk to which the servant was exposed beyond the *natural risk* of the employment, or has *knowingly, and without informing the servant*, used defective machinery which has caused the injury." On a subsequent appeal of the same case, it was held, in effect, that such projection of the bolt, if a defect, was an obvious one, readily detected by inspection, and hence that negligence might be inferred without the plaintiff proving that the defendant had actual notice of such defect. In this respect the case was clearly distinguishable from the one before us.

In *Smith v. Railway Co.*, 42 Wis., 520, the brake-staff or rod on a wood train broke just below the cog-wheel, near the top of the car, on account of an old crack or seam in the same, in consequence of which the plaintiff, who was brakeman on the train, was thrown upon the track and suffered severe injuries. The plaintiff in that case obtained a special verdict and judgment in his favor; but it was reversed "for the reason that there was no evidence which warranted the jury in finding that the defendant was guilty of negligence in not applying a proper and sufficient test to the brake-rod," notwithstanding the jury did find "that the defendant, by the exercise of ordinary care, skill and diligence, might have known of the defect," though it did not. It did not appear whether the car with the defective rod had been purchased by the company or manufactured in its shops. "It was a new flat car, which had

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

been taken into the train but two or three days prior to the accident, and appeared to be a good car." It appeared that the company applied the ordinary tests in manufacturing cars, and the ordinary inspection on the purchase of cars. But the opinion states that, apparently, "the defect in the brake-rod was a latent one, which would not likely be detected or discovered by the usual examination or inspection of the car," and that "it would undoubtedly be impracticable to apply tests to every brake-rod which is used upon defendant's cars, and, if compatible with the nature of the business, would be of doubtful utility. There should be at least some testimony tending to show that the tests applied to determine the sufficiency of the brake-rod were inadequate, and not in accordance with the most approved methods, to justify the finding of the jury." Page 525. Again the court said: "The servant, then, takes the risks of the employment, and of a failure of the machinery *from any latent defect* not discovered by practical tests." Page 526. Such was the language of this court as to the degree of care requisite in a railroad company using cars manufactured or purchased by the company so using the same. Certainly the rule cannot be less favorable to a railway company which neither manufactured nor purchased the defective car, but merely received it, loaded with charcoal, from another company, for the simple purpose of drawing it to the place of consignment and then returning the empty car.

In *Morrison v. Construction Co.*, 44 Wis., 405, the injury was caused by the breaking of a wheel under a freight car in the train, which threw the car containing the plaintiff's horses from the track. The track was in good order; the wheel had been used only a short time, and, upon inspection after the accident, showed no flaw or defect; and there was no evidence, except the mere fact of its breaking, which tended to show negligence of the company, and it was "held that there was no error in directing a verdict for the defendant." It is true, the liability of the defendant in that case was limited by the con-

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

tract of carriage, but that does not render the decision inapplicable, because it was made to "turn and be determined upon the question whether the defendant was careless, negligent or in fault in producing the injury complained of." Page 409.

In *Steffen v. Railway Co.*, 46 Wis., 265, the late chief justice said: "There may be latent risks in an employment. Where these are known to the master, it is his duty to notify the servant; but when they arise from no negligence of the master, but are incident to the nature of the service, and unknown to the master through no negligence of his, the risk is with the servant, not with the master." In *E. St. L. P. & P. Co. v. Hightower*, 92 Ill., 139, the fireman was injured by reason of a defective blow-off pipe, and the court held: "A servant cannot recover of his employer damages for an injury received while in the discharge of his duty, from a defect in machinery used, without showing that the employer had knowledge, or might have had knowledge, of the defect by the use of reasonable diligence." *I. B. & W. Railway Co. v. Toy*, 91 Ill., 474.

In *De Graff v. Railroad Co.*, 76 N. Y., 125, the brakeman on a freight train was injured by reason of the breakage of the chain in applying the brake. From the plaintiff's evidence it appeared that the "company's inspectors were in the habit of examining the brake chains to see if they were in their place and *apparently sound, but did not test their strength.*" The court, however, from all the evidence, "held that the evidence justified a finding that there was some defect in the chain, but not that it was defective when put in, or that it could have been discovered by the exercise of ordinary care, or that such care was not used; and that, therefore, a refusal to nonsuit was error."

In *Warner v. Railway Co.*, 39 N. Y., 468, the plaintiff was injured by reason of the fall of a defective railroad bridge, but it appeared that "the defect was such as was not apparent, and of which it had no notice," and it was held that the rail-

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

way company was not liable. Thus the authorities seem pretty clearly to establish the rule that where the injury is the result of a latent defect, of which the master has no prior knowledge, and which was not discoverable by the exercise of ordinary care, such master will not be held liable. Here, as we have noticed, the car having the defective ladder was not manufactured by and did not belong to the defendant. It may be that the ladder was not constructed in the most approved method.

In *Baldwin v. Railway*, 50 Iowa, 680, it was held that "it does not constitute negligence for a railway company, in the ordinary course of business, to receive and transport the cars of other roads, in general use, which may not be constructed with the most approved appliances, and the transportation or use of such cars by the company is one of the risks which an employee assumes in undertaking the employment." In such case it would seem, upon principle, that the company so receiving a loaded car from another company is entitled to the benefit of the presumption that such car had been properly constructed of suitable material, and had passed the inspection of some one of ordinary skill in such matters, and was reasonably fit for the use to which it was devoted when so received. See *Davis v. Railroad*, 20 Mich., 105. Certainly a railroad company is not required, under all circumstances, to make use only of the safest known appliances and instruments, and to be held responsible for any failure to discard what is not such, and supply its place with something better and safer. *Ft. W., I. & S. R. R. Co. v. Gildersleeve*, 33 Mich., 133. To hold, in such a case, that a railway is liable, and to apply such a rule to a company receiving a loaded car from another railroad, would, in many instances, operate as a prohibition upon interstate commerce. The company is not to be treated as the guarantor of the sufficiency and safety of the cars and machinery of the train, but as responsible only where the injury is without fault of the employee, and the result of the neglect of

Ballou, Adm'x, vs. The Chicago, Milwaukee & St. Paul R'y Co.

that ordinary and reasonable care and diligence in furnishing sufficient and safe cars and machinery for the train, which appertains to that particular branch of business. *M. R. & L. E. Railroad Co. v. Barber*, 5 Ohio St., 541.

It appears from the testimony that the ladder in question was almost in constant use, not by the engineer, nor so much by the conductor, but by the brakeman. The straining test was necessarily applied whenever the brakeman ascended or descended the ladder in question. Such constant use was necessarily by men having eyes, and hence, when the car was in use, the ladder must have received frequent inspection. The defendant company could only inspect and test by the agency of some employee present at the ladder. The brakeman was such employee, and apparently the only one having, at the time in question, charge of the brake on the car, as he had frequently had before, and necessarily tested and inspected the ladder the insufficiency of which is now complained of. His inspection and testing was the company's inspection and testing. His failure to discover any visible indications of insufficiency, while so inspecting and testing, was no more culpable in the company than in himself. Is it logical to hold that, in such practical testing and inspection, his failure to notice visible indications of insufficiency was the exercise of ordinary care, and yet that the invisible entity known as the corporation, looking through his eyes, and using his feet and hands, as much as any other servant of the company, was guilty of negligence in omitting to detect and guard against what he failed to discover? Was the insufficiency of the ladder latent as to the brakeman using the same, but patent as to the company for whom he so used it? Or can it be said that the company was in the exercise of ordinary care so far as inspecting and testing by its brakeman present at the ladder was concerned, but negligent by reason of the failure of some unnamed servant, not present, to apply some unnamed test?

These brakemen, to use the language of RYAN, C. J., in

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

Steffen v. Railway Co., *supra*, "appear to have been employed to perform this very duty . . . at the *locus in quo*." Is the standard of ordinary care of the corporation acting through the brakeman, on the part of the company, so much more stringent than on the part of the brakeman acting for himself, and in view of his own personal safety and life? In the Ohio case cited, the conductor sued the company for injuries sustained by reason of defective cars, but he was "held to ordinary and reasonable care and diligence, not only in the management of the train, but also in the due inspection of the cars, machinery and apparatus of the train, as to their sufficiency and safety." Of course, the company is required to use proper care in furnishing safe and sufficient cars and machinery for the train, but that does not relieve the employee from the exercise of ordinary care. Whether ordinary care requires such employee to inspect or test the part of the car or machinery which so turns out to be defective, would seem to depend very much upon the character of the particular employment, and his relation to and connection with such defective part prior to the injury. It has frequently been held that "an employee who has knowledge of defects in machinery about which he is employed, or who might know them by the exercise of reasonable care, cannot maintain an action for injuries resulting therefrom, if he continues in the employment without objection." *Way v. Railroad Co.*, 40 Iowa, 341; *Kroy v. Railroad Co.*, 32 Iowa, 357; *McGlynn v. Brodie*, 31 Cal., 376; *Devitt v. Pacific Railroad Co.*, 50 Mo., 302; *Dillon v. Railroad Co.*, 3 Dill. C. C., 320; *Sullivan v. India Manuf'g Co.*, 113 Mass., 396; *T., W. & W. R. R. Co. v. Black*, 88 Ill., 112.

In *Hayden v. Smithville Man. Co.*, 29 Conn., 548, it was held that "an employee cannot recover for an injury suffered in the course of his employment, from a defect in the machinery used by his employer, unless the employer knew or ought to have known of the defect, and the employee did not know of it or had not equal means of knowledge." The fair-

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

ness of such a rule cannot well be questioned, as it places both parties upon an equality; and it is not materially different from the rule frequently recognized by this court. *Dorsey v. Construction Co.*, 42 Wis., 583; *Flannagan v. Railway Co.*, 45 id., 98; *S. C.*, 50 id., 462. See also *Clark v. Railroad Co.*, 2 Am. & Eng. Railroad Cas., 240; *Smith v. Potter*, 9 N. W. Rep., 273.

Beyond question, the fastening of the slat or round was insufficient, and was culpable negligence on the part of the person or corporation under whose supervision it was so fastened; but, since it was in apparent good condition, we do not think the defendant receiving the car loaded for transportation and handling it, is guilty of the neglect of another to one of its servants in the habit of handling the same car, and having the same knowledge and means of knowledge as the defendant. Besides, we are to remember that at the time of the injury the slat or round in question must have received an unusually severe strain from the swinging, wrenching method which the deceased adopted to board the car, which boarding at the time was purely a matter of his own choice, and without necessity.

For the reasons given, the judgment of the circuit court must be affirmed.

TAYLOR, J. This action is brought to recover damages for negligently causing the death of Thomas Ballou. The evidence on the trial shows that the deceased had been a brakeman in the employ of the defendant company for several years previous to his death, working on the appellant's road between Green Bay and south of that point; and that he was killed at Depere while assisting in the moving of some cars at that point. His death was caused by the giving way of one of the rungs of the ladder while he was attempting to ascend the same to the top of the car. The ladder was at the end of the car, and when the rung of the ladder gave way he fell in front of the moving car, and was run over and instantly killed. It appears that, in

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

order to mount the ladder, the deceased took hold of one of the rungs of the ladder, threw his feet upon the bumper, then reached up and seized the rung above with his other hand, and so in straightening himself to get on the ladder most of his weight would come upon the upper hand, and the rung giving way before he was straightened up on the ladder, he necessarily fell to the ground and was run over by the car and killed.

The reason why the rung gave way was apparent, when examined after the accident. The car was a coal car, made for hauling charcoal, and was originally a flat car. The box had been put on it by setting up oak stanchions around the sides and ends, fastened at the bottom to the bed of the car, and at the top by cross-timbers, which supported the deck or roof of the car, and was boarded up on the inside of the stanchions so that the frame-work of the car was on the outside. The ladder was made at one end by simply fastening flat slats or rungs to two of the stanchions which formed the box of the car, and these slats or rungs were fastened to the stanchions, at each end, by a single bolt, with a screw at the end, passing through the slat or rung into the stanchion. On examining the rung which gave way, it was found that the bolts at each end were too short, not penetrating the stanchions more than about a half inch, so that when the weight of the brakeman came upon it, combined with the outward strain which was given to it in his attempt to bring himself upon the ladder, it immediately gave way.

The evidence also shows that this car did not belong to the defendant company, but to the Green Bay & Minnesota Railroad Company, and was received by the defendant company at Green Bay to be hauled to Depere, where its loading was to be discharged, and then returned to the Green Bay Company at Green Bay; and that this and other cars of a like make had been frequently received by the defendant company from the Green Bay Company, for the purpose above specified, while the deceased had been in its employ. There is no dispute

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

made by the defendant that the rung of the ladder which gave way was not, in fact, securely fastened, nor that, if it had been securely fastened, the accident would not have happened. That the bolts were too short is admitted by all. It was said by the learned counsel for the respondent company, that the fastenings of the other rungs of the ladder had been examined after the accident, and it was found that the bolts in them were much longer than those in the rung which gave way; that the bolts in the remaining rungs entered the stanchions at least an inch and a half or two inches. There was, however, no evidence of this fact given on the trial.

One of the witnesses for the plaintiff, who examined the ladder shortly after the accident happened, testified that he found a hole in the stanchion just beside the place where the bolt which gave way entered the same, and that in that hole there appeared to be part of a bolt which seemed to have been broken off and left in the wood; and from this fact it may well be inferred that the rung which gave way had been put on in the place of another which had before that time occupied the same place, and had by some means been broken off, leaving a part of one of the bolts which held the same in the stanchion. This inference would be strengthened by what is alleged by the learned counsel for the respondent, that the remaining rungs were fastened with much longer bolts. Had they all been put on at the same time, there is a strong presumption that the bolts fastening the same would have been of the same length. There was no evidence showing conclusively any contributory negligence on the part of the deceased.

There was some evidence given by the plaintiff tending to show that a competent mechanic could tell by the size of the bolt heads that they were both too short and too small for the purposes to which they were put, and also that there was some slight indication of decay in the wood at the place where the bolts penetrated the same. This evidence was, however, of a very unsatisfactory kind, and so slight in itself that I am not

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

prepared to say it was sufficient to sustain a verdict in favor of the plaintiff, in the absence of any duty upon the part of the plaintiff to have ascertained the unsafe manner in which this fatal rung was fastened, except the duty which would arise by reason of the indications spoken of by the witness. There was no evidence given on the part of the defendant showing that any inspection had ever been made of this car by any person, either competent or incompetent, nor any evidence of what were the ordinary methods among railroads of inspecting cars which came to them from other roads. The learned circuit judge, on the motion of the respondent, nonsuited the plaintiff, and the plaintiff appeals to this court. It is admitted by the learned counsel for the respondent — and if it were not, it seems to me that it is too well settled to be controverted, — that had this action been against the company which was the owner of the car and using the same, by an employee of that company who had been injured by the giving way of the rung in question, there could be no doubt as to the right of the plaintiff to a verdict upon the evidence offered in the case, or, at least, to have had the question of negligence on the part of the defendant submitted to the jury.

The evidence disclosed such a glaring defect in the construction of the ladder, so threatening to the lives and limbs of those who, in the discharge of their duties, were compelled to use it, that no court would say that it was not evidence tending to show a want of ordinary care on the part of the company in using so dangerous an appliance for the accomplishment of its work. If the rung was put on as a repair in place of another which had before given way, the company would be held liable for the careful making of such repair by the person or persons detailed by the company for that purpose. All the cases hold that the company must be treated in such case as doing the work in its individuality to the same extent as though the insubstantial entity which is called the corporation did the act itself. Its employee for that purpose is the com-

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

pany, and the carelessness or negligence of such employee is the carelessness or negligence of the corporation. To establish this doctrine it is unnecessary to look to other courts for authority. This court has determined the question for itself. *Brabbitts v. Railway Co.*, 38 Wis., 289; *Wedgwood v. Railway Co.*, 41 Wis., 478; *Schultz v. Railway Co.*, 48 Wis., 375.

My opinion is that the same rule would apply to the company owning and using the car, as between itself and one of its employees, wherever such company is itself the maker of such car or other machinery. I think that in such case, as between the corporation and employee, the corporation warrants that its appliances are made of sound material, and that the workmanship is not faulty, but is sufficient in every respect to answer the purposes for which they are intended; and that if the persons making such appliances are careless either in the use of materials or in the workmanship, and an injury occurs to an employee by reason of such carelessness in either respect, such carelessness is the carelessness of the corporation, and for such carelessness it is answerable. No defect is latent, so as to excuse the corporation, either in the materials or in the workmanship, which is known to its employees engaged in its manufacture, or which would have been known to them if they had exercised due care. *Smith v. Railway Co.*, 42 Wis., 520, 526. In the last case, the present chief justice, in delivering the opinion, quotes approvingly the following from the opinion in the case of *Laning v. Railroad Co.*, 49 N. Y., 521: "That the duty of the master to the servant, or his implied contract with the servant, requires that the servant shall be under no risk from imperfect or inadequate machinery, or other material means or appliances, or from unskillful or incompetent fellow-servants of any grade. It is a duty or contract to be affirmatively and positively fulfilled and performed. And there is not a performance of it until there has been placed for the servant's use perfect and adequate physical means, and for his helpmates fit and competent fellow-servants;

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

or due care used to that end. *That some general agent, clothed with the power and charged with the duty to make performance for the master, has not done his duty at all, or has not done it well, neither shows a performance by the master, nor excuses the master's non-performance. It is for the master to do by himself or by some other. When it is done, and not till then, his duty is met or his contract kept."*

And, after making the foregoing quotation, the chief justice adds: "The servant then takes the risks of the employment, and of a failure of the machinery from latent defects not discovered by practical tests. And this court, moreover, has held expressly that the negligence or misconduct of the officer or employee whose duty it is to attend to these things, and who, *pro hac vice*, represents the company in the matter, is the negligence or misconduct of the company itself." The same doctrine was approved by this court in the cases of *Bessex v. Railway Co.*, 45 Wis., 477, and *Wedgwood v. Railway Co.*, 41 Wis., 478; *S. C.*, 44 Wis., 44. This doctrine is approved in *Ford v. Fitchburg Railroad Co.*, 110 Mass., 241. In that case the court state the rule as follows: "The rule of law which exempted the master from responsibility to the servant for injuries received from the ordinary risks of his employment, including the negligence of his fellow-servants, does not excuse the exercise of ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required. One who enters the employment of another has a right to count on this duty, and is not required to assume the risks of the master's negligence in this respect. The fact that it is a duty which must be always discharged, when the employer is a corporation, by officers and agents, does not relieve the corporation from that obligation. The agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule to be relied on, *to be regarded as fellow-servants of those who are engaged in operating it. They are*

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

charged with the master's duty to the servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even where the same person renders service by turns in each, as the convenience of the employer may require. . . . The corporation is equally chargeable, whether the negligence was in originally failing to provide, or in afterwards failing to keep its machinery in safe condition."

This language of the court in the Massachusetts case was quoted and approved by the supreme court of the United States in the case of *Hough v. Railway Co.*, 100 U. S., 213-219; and Mr. Justice HARLAN, who wrote the opinion in that case, says:

"A railroad corporation may be controlled by competent, watchful and prudent directors, who exercise the greatest caution in the selection of a superintendent or general manager, under whose supervision and orders its affairs and business in all its departments are conducted. The latter, in turn, may observe the same caution in the appointment of subordinates at the head of the several branches or departments of the company's service. But the obligation still remains to provide and maintain, in a suitable condition, the machinery and apparatus to be used by its employees—an obligation the more important, and the degree of diligence in its performance the greater, in proportion to the danger which may be encountered. Those at least in the organization who are invested with controlling or superior authority in that regard, represent its legal personality; their negligence, from which injury results, is the negligence of the corporation. The latter cannot, in respect of such matters, interpose between it and the servant who has been injured without fault on his part, the personal responsibility of the agent, who in exercising the master's authority has violated the duty he owes as well to the servant as to the corporation.

"To guard against misapplication of these principles, we

Ballou, Adm'x, vs. The Chicago, Milwaukee & St. Paul R'y Co.

should say that the corporation is not to be held as guarantying or warranting the absolute safety under all circumstances, or the perfection in all of its parts, of the machinery or apparatus which may be provided for the use of employees. Its duty, in that respect, to its employees is discharged when, *but only when, its agents, whose business it is to supply such instrumentalities, exercise due care as well in their purchase originally as in keeping and maintaining them in such condition as to be reasonably and adequately safe for use by employees.*"

In the same case the learned justice quoted the language of Mr. Wharton as follows: "At the same time we must remember that when a master, personally or through his representatives, exercises *due care in the purchase or construction of buildings and machinery, and in their repair*, he cannot be made liable for injuries which arise from casualties against which such care would not protect. It is otherwise if there be a lack in such care *either by himself or his representatives*. The duty of repairing is his own, and, as we shall see hereafter, the better opinion is *that he is directly liable for the negligence of agents* when acting in this respect in his behalf. If the master knows, or in the exercise of due care might have known, that . . . his structures or engines were insufficient, either at the time of procuring them or at any subsequent time, he fails in his duty."

It seems to me that these authorities clearly establish the proposition above stated, that as to all machinery or appliances manufactured by the corporation and used by it there is a guaranty that such appliances so made and used are of sound materials, and that the workmanship is not faulty, and that if the materials are unsound or defective, or the workmanship is faulty, and an injury occurs to one of the employees by reason thereof, the company is liable to such employee for the damages resulting from such injury. In such case the bad materials are furnished and the faulty workmanship is done by the corporation itself. As to faulty workmanship there

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

can be no excuse, and it can only be excused in the use of bad materials where the defects in them are latent, and could not be discovered by proper examinations and tests. Whether the same rule in its full extent would apply to the corporation where it purchased the machinery or appliance from some other party who is the maker, is, perhaps, a matter of some doubt upon the authorities. But if the strict rule above stated is not applicable to the case of purchased machinery or appliances, and if in such cases the master is not, as to his employees, a guarantor of the soundness of the materials and the perfection of the workmanship, he is certainly liable for all imperfections in the materials or workmanship which could be discovered by a thorough inspection, and the application of the most approved and efficient tests.

Under the rules above stated as to the duty of the maker or purchaser of machinery to his employee, it will hardly admit of a doubt that the master ought to have ascertained so palpable and dangerous a defect as existed in this case. At all events, the existence of such a defect would have been evidence of a want of due care on the part of the master, from which a jury might well have found negligence on the part of the master, either in making a proper inspection or in applying the proper tests. But it is urged that a railroad company which receives a car from another company to transport over its road for a greater or less distance, is not under the same obligation to its employees to see that it is safe and perfect in all its parts. And this was so held by the supreme court of Michigan in the case of *Smith v. Potter*, 9 N. W. Rep., 273; *S. C.*, 2 Am. & Eng. R. R. Cas., 140. In that case, however, considerable stress was laid upon the fact that in the state of Michigan every railroad was bound by law "*to receive and forward cars of other roads impartially and diligently.*" The court held, among other things, that this law did not compel a railroad to receive or transport cars unfit for passage, or that the company required to receive the cars might not detain

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

them long enough to make a sufficient inspection of them in order to determine their fitness. It also held that the inspectors whose duty it was to inspect the cars which came on the road from other roads, were co-employees with the other employees of such road, and that for their negligence in not making a proper inspection of the cars so received, by reason whereof a defective car was received and a brakeman was injured thereby, the brakeman could not recover.

I know of no law in this state which compels one railroad company to receive and transport the cars of other roads over its line when requested to do so; but I am free to admit not only that such is the practice, but that, for the convenience of trade and commerce, it is a method of doing business which should receive the approval of the courts as absolutely necessary to the proper, cheap and speedy transaction of business over the roads of the country. The determination of the Michigan court that the inspectors of cars, whose duty it is to see that they are in proper repair, and when out of repair to see that proper repairs are made, are co-employees with the persons whose duty it is to use the machinery and other appliances furnished by the master, is not sustained by the authorities above cited; and that doctrine was expressly repudiated by this court in the case of *Shultz v. Railway Co.*, *supra*. But if that were the doctrine, it would not affect the decision of this case, which arose under our statute which makes the company liable for an injury to one of its employees, when such injury is the result of the negligence of a co-employee.

If we admit that a less stringent rule as to care and diligence shall be required of the railroad company in respect to the cars which they receive from other companies and draw over their road for the mutual benefit of both companies and in the general interest of trade, a proposition which is perhaps doubtful under the authorities (see *Stetler v. Railway Co.*, 49 Wis., 609; *S. C.*, 46 Wis., 497-503; *Railroad Co. v. Barron*, 5 Wall., 90; *McElroy v. Railroad Corp.*, 4 Cush., 400; *Nel-*

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

son v. Railroad Co., 26 Vt., 717; 2 Redfield on Railways, 302, 303; *Ill. Cent. R. R. Co. v. Kanouse*, 39 Ill., 272; *Schopman v. Railroad Corp.*, 9 Cush., 24), still such fact does not release the company from all obligation to protect its employees against the dangers resulting from imperfect machinery and appliances. That duty still rests upon the company, and its duty in that respect must be performed with the utmost care and diligence consistent with the performance of its duty to the interests of trade and commerce. If it be admitted that the necessities of business are such that the safety of life and limb of the employees of railroads must be put in some jeopardy as a sacrifice to such necessities, certainly the lives of the employees are not to be unnecessarily sacrificed to such interests. It seems to me that the companies should be held to the exercise of all the care and diligence to protect its employees from the defects of cars coming on their tracks, which is consistent with the necessities of business. As was said by the Michigan court, although the statute requires one company to receive and transport cars which are offered to them for that purpose, still it is not required to receive or transport cars which are unfit to be used, or threaten danger or death to its employees.

There was certainly a duty imposed upon the defendant company to exercise some degree of care to prevent the transportation over its line of road of any cars or appliances of other companies which were so defective in their construction, or which had become so defective by use, as to be unfit for further use, and which, on account thereof, endangered the lives or limbs of its employees. There is also a well defined rule that the care required of the company is, in some degree, measured by the consequences which are likely to result from a defect in any part of the machines or appliances in use by its employees. If no evil results are likely to fall upon the employee from a defective piece of machinery or other thing in use by the company, or if such results would not follow ordi-

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

narily by their use, it is plain that the degree of care required of the company would not be the same as though very serious injuries were likely to follow therefrom.

In the case at bar, a defective ladder placed, as the one in question was, at the end of the car, was one of the most dangerous appliances the company could possibly furnish its employees. It is well known that the employee is frequently required, in the discharge of his duty, either to ascend or descend such ladder while the car to which it is attached is in motion. Any defect therein which would throw the employee therefrom while so using it, would be likely to result in his death, or some very great bodily injury. The result of the defect in this case is one which would be likely to happen in every case where a like defect existed. The plaintiff made clear proof of the defect which caused the death of the deceased. The defect was of such a character as would clearly charge the owner with knowledge thereof if the ladder had been constructed by the owner or its employees, or if the defect had been caused by the repair of such ladder after it had been made. If the owner of the car had purchased it ready-made, and the defect of the ladder had been in its original construction, such owner would also be chargeable with knowledge of such defect, if it could have been discovered by proper tests and inspection; and if, while in use by such purchaser, the defect in the ladder had resulted from the carelessness of its employees in repairing the same, then such purchaser would have been charged with a knowledge of the defect absolutely, in like manner as though the defect had been in the original construction and the owner was the constructor. Had the defendant company been the owner of the car to which the defective ladder was attached, I think it quite clear that the evidence produced by the plaintiff would have been ample, unexplained and uncontradicted, to have entitled her to have the question of the negligence of the defendant submitted to the jury; and I do not understand that my brethren differ with me in opinion upon that point.

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

Does this evidence tend to prove the defendant company guilty of negligence? My brethren hold that it does not, because it appears that it was not the owner of the car, but had received it from another company for transportation over its road. With all proper respect for the opinion of my brethren, I am unable to agree to this proposition. It may be true that, as between the company receiving cars for transportation and the company furnishing them, the company receiving the same may rely upon the presumption that the cars are fit for use, and that the furnishing company has made such tests and inspection thereof as would show their fitness for such use. And possibly, as between the two companies, the receiving company is not bound to make any inspection thereof before using them, in order to charge the furnishing company with any damages which might result from that use by reason of any defects existing at the time they were received. There is, no doubt, an implied warranty on the part of the furnishing company that the cars are reasonably fit for use, and, unless the defect be plainly visible, there is, as between these parties, no duty on the part of the receiving company to make any particular examination for defects; and if injury results from the use of the cars from defects which ought to have been known to the furnishing company, such company would, undoubtedly, be liable to make good the damages.

This rule as to the duty of the receiving company, as between itself and the furnishing company, is not in my opinion the rule as to the duty of the receiving company to its employees. The fact that the car is not its own does not relieve the company using it from its general obligation not to subject its employees to unnecessary danger by the use of imperfect or defective machinery or appliances. This obligation is continuous and universal, and it cannot relieve itself of such obligation by pleading that it was not the owner of the car or machinery, and that the owner had warranted its perfection and fitness for use, and that it relied on such warranty. If that rule should be adopted in a case of this kind, there does not seem

Ballou, Adm'x, vs. The Chicago, Milwaukee & St. Paul R'y Co.

to be any good reason why the company might not in like manner relieve itself from liability to its employees for defects in any machinery which it had bought from any person or corporation, with a like implied warranty as to its sufficiency, without showing any tests or inspection in order to ascertain its sufficiency.

It seems to me that the liability of the company as to its employees is the same whether the company has purchased the defective machinery or cars, or whether it has received them for use upon its road from another company. There certainly can be no doubt upon this point as to such machines or cars as the company lease from the owner for a definite term, and use upon their road. In cases like the one at bar, the receiving company takes the car and transports it for its own benefit, and only incidentally for the benefit of the furnishing company. It would seem that in such case the cars transported, as between the company transporting them and its employees, should be treated as the cars of such company. While in use, the receiving company has the absolute control of the same—as much so as of any car owned by the company. Any negligence which can be imputed to the purchaser of a car, as between itself and its employees, in not purchasing perfect and suitable cars for use, must be imputed to the company which receives upon its road for transportation the cars of another company. If the convenience of business prevents the receiving company from making such inspection and tests of the cars received as are usually made and required of a company purchasing or leasing cars for its permanent use, and it is compelled to rely upon the vigilance of the company from which the cars are received to detect imperfections therein, then, as between itself and its employees, the want of vigilance on the part of the company purchasing the cars must, as between the company using the same and its employees, be imputed to the company using them, and such employee may recover damages for any injury resulting to him

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

from a defect in such car which ought to have been discovered by the company furnishing them, either from the master in whose use the car was at the time of the injury, or from the owner of the car.

There is, perhaps, some analogy between a case of this kind and that of a city or other municipality which permits a citizen to make excavations or do other acts in its public streets which are dangerous to the public. In such cases, if the citizen doing the work in the street does it in a careless manner, so as to endanger the safety of the traveler, and injury occurs to the traveler by reason of such neglect, the neglect of the person doing the work in the street is imputed to the municipality, and the party injured may have his action for the injury against the municipality, or against the person whose negligent acts caused the injury. The cars of one company used by another on its road, and which cars it is the duty of the employees of the company using the same to handle, manage and care for, the same as other cars owned by the company, must be treated for the time being as the cars of the company using them, and the company so using them should be held to the same responsibility to its employees for their safety as though it was the owner of them. No other rule will furnish any protection to its employees, and, if not enforced, then as to cars transported by the company over its line not owned by it, its employees will be subjected to the risk of life and limb from defects which show criminal negligence on the part of the owners of the cars, without remedy, unless they seek it from the corporations owning them.

Every person who has observed a passing freight train on one of our great railroads, knows that it is, as a general rule, made up of cars owned by several independent railroad companies; and many trains will be made up of cars owned by railroad companies located in distant states. Shall the employee, whose duty to his employer requires him to care for and manage all these cars in like manner, when injured by a defect

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

which ought to have been known to the company owning the same, be told that he must seek his remedy of that company, located in New England, New York, or some other state so far from his locality as to render his remedy almost hopeless of any beneficial results? Or shall he be permitted to say to his employer: "These cars are transported by you for your exclusive benefit, so far as they pass over your road. You have employed me to care for and manage alike all cars which you choose to transport; and under the general and well-established rules of law you are bound to see to it that you do not endanger my life or limbs unnecessarily by the use of cars which, by reason of imperfections, are dangerous?" It seems to me that there should be but one rule as to all cars used. The company, for the time being, and while the cars are in use by it, should, as between it and its employees, be deemed the owner thereof.

The fact that in this case the company owning the car and the company using it are both located in this state, and the fact that the company using the car transported it but a few miles, can have no effect in changing the liability of the company using and transporting the same. If the defendant company be not liable for the defect in this car, then it would not be liable though the car were owned by some New England corporation, and though it had been transported over its line from Chicago to Omaha or Dakota. It seems to me that justice to the employee requires that the company using a car and transporting it over its road must be held to the same liability, as between itself and its employee, as though it owned the same, and had acquired its title by purchase; and that, as between itself and its employees, it must be held responsible for all defects which it would be liable for had it been the owner by purchase. Any less degree of responsibility will furnish no protection to the employee against the use by his employer of the most dangerous cars, engines and other appliances. This rule will work no injustice to the railroads. It is for their conven-

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

ience that an interchange of cars should be made, as well as for the convenience of the public and the rapid transaction of business; and if, as suggested above, it is impracticable to make a thorough inspection of cars at every transfer from one company to another, still the owning company sending out its cars guaranties to all other companies receiving them that they are reasonably fit for use, and if they are not, and any damage occurs to the company or companies receiving and transporting them, either directly by an injury to their railroad cars or other property, or indirectly by an injury to its employees, for which it is compelled to make compensation, such receiving company can recover over against the company owning the cars and furnishing them for transportation. Any other rule than the one suggested leaves the employee entirely remediless against his employer, as the result reached by the decision in this case shows.

The circuit court nonsuited the plaintiff, although she showed that her husband had been killed by a defect, either in the original construction of the ladder to the car or in its subsequent repair, so gross in its character as showed criminal carelessness on the part of the maker or repairer. This nonsuit can only be sustained on the theory that the defendant using this car was bound to make no inspection or tests which would have discovered the defect; that to make the defendant using the car liable for a defect in its construction or repair, the defect must be such that it is apparent to the casual observer by looking at the same. This rule comes very near excusing the defendant altogether. It requires the injured party to show affirmatively, either that some responsible officer, agent or employee of the company, whose duty it was to see that its cars were kept in repair, knew of the defect before the accident happened, or that he might have known it by the sense of sight, without any other aid, and without any test of any kind. This rule relieves the company from liability for any defects not visible. It imposes no duty on the company to make ex-

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

amination for any defects not visible. And, as in the case of defects which were so palpable as to be readily apparent to the casual observer, it would be quite difficult for the employee to recover for an injury resulting therefrom, the result of the ruling of the court in this case will be, that no recovery can be had in any similar case unless the employee could prove that some responsible employee of the company had in fact made an examination, which he was not bound by any rule of law to make, and so had discovered the defect before the accident happened.

The rule laid down by the supreme court of the United States in the case of the *Pennsylvania Co. v. Roy*, 102 U. S., 451, as to the liability of a railroad company to its passengers for injuries received by reason of the defective construction of a car constituting a part of the train, not owned by them and for the use of which the passenger pays another company a separate charge, is, I think, strictly applicable to the liability of the company to its employee for an injury received by reason of a defective car owned by another company, but transported and used for the time being by the master company, and in regard to which car the duties of the employee are the same as if such company owned the same: "The only distinction is in the degree of care which the company is bound to exercise in the two cases. In its relation to the passenger, the company is bound to exercise the utmost caution characteristic of very careful judgment, and is responsible for injuries resulting to a passenger which might have been avoided by extraordinary vigilance, aided by the highest skill."

In its relations to its employees, the company is bound to exercise a less degree of care and skill in furnishing and keeping in repair its cars and machinery for the use of its employees; and the least degree of care and skill required is such as an ordinarily careful and skillful man would use under like circumstances. And the degree of care and skill required, as

above remarked, is modified by the dangerous consequences which are likely to result to its employees from the use of the particular machine or appliance, if defective or imperfect. In the opinion in the case above referred to, the court, after stating the strictness of the obligation of the carrier to protect him against any damage, says: "These doctrines, to which the courts, with few exceptions, have given a firm and steady support, and which it is neither wise nor just to disturb or question, would, however, lose much, if not all, their practical value, if carriers are permitted to escape responsibility upon the ground that the cars or vehicles used by them, and from whose insufficiency injury has resulted to the passenger, belong to others. . . . The duty of the railroad company was to convey the passenger over its line. In performing that duty it could not, consistently with the law and obligations arising out of the nature of its business, use cars or vehicles whose inadequacy or insufficiency for safe conveyance was discoverable upon the most careful and thorough examination. If it chose to make no such examination, or cause it to be made—if it elected to reserve or exercise no such control or right of inspection from time to time, of the sleeping cars which it used in conveying passengers, as it should exercise over its own cars,—it is chargeable with negligence or failure of duty. . . . The law will not permit a railroad company engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping-car company whose cars are used by, and constitute a part of, the train of the railroad company, to throw off the duty of providing means for the safe conveyance of those whom it agrees to convey."

This language is strictly applicable to the duty of the company to its employees, except as to the degree of care and skill to be used in the selection and maintenance of suitable and safe cars, engines, machinery and appliances for the use of its employees. The duty of the employee being to look after, use and manage all cars in use upon his employer's road, the

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

duty of the employer should be the same in respect to all such cars, no matter by whom owned, to see that they are in a reasonably safe condition for use upon its road; and the reasons for holding the company to such liability to its employees is full as strong as the reason for holding it responsible to its passengers under like circumstances.

If it be admitted that the defendant company in this case was charged with any duty, as between itself and its employee, to see that the ladder which caused the injury was in a reasonably safe condition for his use at the time the accident happened, then it appears to me it was error to nonsuit the plaintiff upon the evidence produced by him. If it be said that the defect was, in some sense, a secret defect, still it was not such a defect as might not have been easily discovered by tests and examinations; and, in the absence of all proof that the company had made any examination or tests for the purpose of discovering the defect, it presented a question of fact for the jury to determine whether reasonable inspection or tests would have discovered it, and not a question of law for the court.

The plaintiff having shown gross carelessness either in the construction or in the repair of the ladder, the evidence tended to prove carelessness on the part of the company. If it was charged with any care in regard to the car at all, it would seem that, in order to exonerate itself, it should have shown that no inspection or tests which are made by railroad companies, of its cars and their appliances, would have discovered the defect; or, at least, it should have shown that it made such inspection and tests, by competent men, as are made by railroad companies generally, and that the defect was not discovered. It is certainly a question of fact, and not of law, whether a proper inspection or test of the ladder would have discovered the defect therein; yet the learned circuit judge determined, as a question of law, that no proper inspection or test would have discovered such defect. How can the learned circuit judge, or the judges of this court, know that a proper in-

Ballou, Adm'r, vs. The Chicago, Milwaukee & St. Paul R'y Co.

spection and test would not have discovered the defect? I think it quite probable that neither would have been competent, as a witness, to have expressed an opinion as an expert as to what would be a proper inspection of the car and its appliances, or whether such proper inspection would have been likely to have discovered the defect in question. How, then, can we say that no reasonable inspection or tests would have discovered this defect? And yet that is what was said by the learned circuit judge, without any proof to enlighten him upon that subject.

It is, I think, apparent that the ruling of the learned circuit judge can only be upheld by holding that as to this car, not owned by the defendant, it owed no duty to its employee to see that it was in a safe condition for use upon its road; that, as is said in the opinion of the court in this case, the defendant company had the right to presume that proper inspection and tests had been made by the company owning the car, and from which the defendant received it, and that consequently there was no duty of inspection or tests imposed upon the defendant. I cannot bring myself to that conclusion. I think the law is and should be otherwise. If a railroad company receives upon its road, for transportation, the cars of another road, and requires its employees to look after and care for them, the same as it does as to its own, the obligation to see that they are reasonably safe for use rests upon the company the same as though it was the owner. As I have said above, no other rule will be just, or furnish any protection to the employee.

The assumption in this case that reasonable care on the part of the defendant company would not have discovered the defect which caused the injury, is the assumption of a fact not proved in the case, and to support which there is no evidence. The other assumption, that there was any duty imposed on the brakeman to make inspection of the car or ladder to see whether it was fit or safe for use, is an assumption based upon

Hull vs. Winnebago County.

no proof, and is in no sense a question of law, except so far as the law might charge the brakeman with knowledge of a plain and visible defect, and defeat a recovery because the defect was so plain and visible that he could not but have known of its existence, and consequently took the risk of using that which was clearly dangerous to use. The effect of the decision in this case must be, I think, to discharge the railroad company from any care or diligence in furnishing safe or suitable cars, machines or appliances for the use of its employees, in all cases where the company is not the owner of them, no matter what the defect in the construction or repairs made upon the same, unless such defect is patent to the most casual observer; and where it is so patent, it is probable the employee could not recover, because he would be equally chargeable with notice of the defect as the company. To such a doctrine of responsibility of the master to his employee I cannot assent.

In my opinion the circuit judge erred in taking the case from the jury and directing a nonsuit, and for that reason the judgment ought to be reversed.

By the Court.—Judgment affirmed.

HULL VS. WINNEBAGO COUNTY.

January 18 — February 7, 1882.

COUNTY BOARD: *When it may determine salary of county treasurer.*

Ch. 75, Laws of 1867 (Tay. Stats., ch. 13, § 62), gave the county board of supervisors power, "at the annual meeting in November," to determine the amount of the annual salary that should be received by the county treasurer who was to be elected in the county "during the ensuing year." *Held*, that the board might determine such amount at an *adjourned* session of such annual meeting, though held so late as March of the subsequent year, and that the salary of the treasurer elected at the following fall election would be limited by such determination.

Hull vs. Winnebago County.

APPEAL from the Circuit Court for *Winnebago* County.

The county board of supervisors of Winnebago county having rejected plaintiff's claim to be paid a certain sum as a balance due him on his salary as treasurer of said county during the years 1879 and 1880, he appealed to the circuit court; and from a judgment there in favor of the defendant county, he appealed to this court.

The grounds of the plaintiff's claim will sufficiently appear from the opinion.

For the appellant there was a brief by *Finch & Barber*, and oral argument by *Mr. Barber*.

Geo. W. Burnell, for the respondent.

COLE, C. J. The facts upon which the question of law arises in this case, are these: The plaintiff was elected county treasurer in November, 1878, and entered upon the duties of his office on the first Monday of January following. The annual salary of his immediate predecessor, as fixed by the county board, was \$1,400. The annual session of the county board which began November 13, 1877, was continued until the 28th of that month, when it was adjourned to the 8th of January, 1878. After a session of three days in January, it was again adjourned to the 12th day of March, 1878, when the annual salary of the county treasurer was fixed at \$1,100, which has been paid the plaintiff. The whole contention is, whether the county board, at its adjourned session in March, 1878, had power to fix the salary of the county treasurer who was to be chosen at the general election in November following.

The statute which regulated or restricted the power of the county board in the matter was chapter 75, Laws of 1867. See 1 Tay. Stats., ch. 13, § 62. The first section of that chapter reads as follows: "At the annual meeting in November, in every year hereafter, the county board of supervisors for the several counties shall fix and determine the amount of the annual salary that shall be received by each and every county

Hull vs. Winnebago County.

officer who is to be elected in their respective counties during the ensuing year, and whose annual salary said supervisors have now or may hereafter have authority to establish." In case the county board failed to establish the salary of any county officer as provided for in the act, then such officer was to receive the same annual salary as that received by his immediate predecessor in office. Section 3.

Now, the learned counsel for the plaintiff contends that the action of the board fixing the annual salary of the treasurer at \$1,100 in March, was wholly inoperative so far as his client is concerned, who, he says, is entitled to the salary of his immediate predecessor in office. He claims this for two reasons, or upon two grounds: *first*, because the change was not made in the month of November, 1877, as the statute contemplates; and *second*, because, if a change could be made at any time during the November session of the board, such change could only apply to or affect the salaries of officers who should be elected during the next ensuing year after the change was made. On the other hand, the learned counsel for the county insists that the power of the board to fix the salary was not limited by the statute to the precise month of November, but that the board had authority to fix the salary at any adjourned meeting of the annual session which began in November.

We are inclined to adopt the latter view of the statute as being the correct one. It is certainly true that the statute is not expressed in the most apt and concise words; but still there is no difficulty in arriving at its true intent and meaning. That intent obviously was to give the county boards the power to determine the amount of salaries of county officers. It is quite clear that the statute contemplates that the power shall be exercised at a period remote from the time when such officers were to be chosen, in order to prevent the influence of partisan bias or personal feeling on the part of members of the board in fixing the salary. And, furthermore, it was probably deemed desirable that candidates for office should

know precisely what compensation was attached to the office. Hence the statute provided that the board should fix, at its annual meeting, the amount of annual salary which each county officer should receive. It is said that there was but one annual meeting of the board, which, by law, was to take place in November; consequently the words "in November" plainly imply that the power was to be exercised in that month and at no other time. But the words "in November," we think, were inserted out of abundant caution, to designate the session at which the board should act in the matter. The correctness of this view will be more apparent when one remembers that by section 26, ch. 538, Laws of 1865, the board was required "to meet annually on the second Monday of July," to equalize property assessed for taxation; also, by section 7, ch. 130, Laws of 1868, it was required "to meet annually on the fourth Monday of May" to perform this duty. Therefore, "the annual session in November" was designated as the one at which salaries were to be fixed, in order to distinguish it from the other "annual meeting" of the board. And hence the board was required to fix the salary some time during the November session. This it did do in the present case. The annual meeting was continued by regular adjournments to March, when action was taken and the salary fixed.

But it is further insisted by plaintiff's counsel, that, even if the board had power to change the salary at any time during its annual session, such change could not apply to an officer elected the same calendar year. It is said that the words "ensuing year" in the sentence have reference to the officer to be elected, and mean one who is chosen the next year after the salary is fixed. We must presume the legislature enacted the statute in view of the notorious fact that the entire business of county boards was usually completed in a few weeks; generally before the close of the year. This accounts for the language used in the statute. But if for any reason the annual session was continued until after the first of January, the

The J. I. Case Threshing Machine Co. vs. Miracle, Ex'r, Garnishee.

board might change the salary at an adjourned meeting, and have the change apply to officers chosen at the following fall election. We do not think this construction does violence to the statute. At one time the board had power to fix the salary of the county treasurer after his election and before the commencement of his term of office. Chapter 220, Laws of 1863. The plaintiff, long before his election, had full notice what his salary was to be. He accepted the position with full knowledge on his part of what compensation was attached to the office, and no wrong has been done him. And we fully agree with the counsel for the county that the spirit of the statute was complied with by the board when it changed the salary in March.

By the Court.—The judgment of the circuit court is affirmed.

THE J. I. CASE THRESHING MACHINE COMPANY vs. MIRACLE,
Executor, Garnishee.

January 18 — February 7, 1882.

Liability of administrator to garnishment.

An executor or administrator is not subject to garnishment before a final order for the distribution of the estate is made; and where he is summoned as garnishee before the making of such order, judgment cannot be taken against him therein *after* the order is made. Whether he is subject to garnishment after such final order, is not here determined.

APPEAL from the Circuit Court for *Winnebago* County. Garnishment, in aid of an execution issued on a judgment recovered by the plaintiff company against Charles Miracle. The defendant, the executor of the estate of Joseph Miracle, was summoned, soon after he had qualified as such executor, and before the expiration of the time fixed by the proper county court for presentation of claims against the estate of

The J. I. Case Threshing Machine Co. vs. Miracle, Ex'r, Garnishee.

the testator. The testator by his will bequeathed \$400 to Charles Miracle, the execution debtor. When the executor was summoned as garnishee, he had several thousands of dollars in his hands belonging to the estate, the same being the proceeds of a sale of real estate. The garnishee answered the above facts, and the plaintiff made an issue on his answer. Before the issue was tried, the estate of the testator was settled, and the county court made a final order of distribution, in which the executor was directed to pay the amount of the above legacy to the execution debtor. On the trial of the issue, the circuit court held that the executor was not liable to garnishment, and gave judgment for the garnishee. The plaintiff appealed from the judgment.

For the appellant there was a brief by *Crozier & Tyrrell*, and oral argument by *Mr. Tyrrell*:

Sec. 2752, R. S., provides that "any creditor shall be entitled to proceed by garnishment in the circuit court of the proper county against *any* person (except a municipal corporation) who shall be indebted to, or have any property whatever, real or personal, in his possession or under his control, belonging to, such creditor's debtor." Under sec. 4972, the words "personal property" include money, goods, chattels, things in action and evidences of debt. Sec. 2768 provides that, "from the time of the service of the summons upon the garnishee, he shall stand liable to the plaintiff to the amount of the moneys, credits and effects in his possession or under his control belonging to the defendant, or in which he shall be *interested*, to the extent of his *right* or *interest* therein, and of all debts due or to become due to the defendant, except such as may be by law exempt from execution." A legacy is a vested interest, and constitutes effects of the legatee in the lands of the executor. *Stratton v. Ham*, 8 Ind., 84, and cases there cited; *Hayward v. Hayward*, 20 Pick., 517-519; *Holbrook v. Waters*, 19 id., 354; *Wheeler v. Bowen*, 20 id., 563, and cases there cited; *Hoar v. Marshall*,

The J. I. Case Threshing Machine Co. vs. Miracle, Ex'r, Garnishee.

2 Gray, 253. The late authorities hold that a distributive share of an estate in the hands of an executor or administrator, belonging to an heir-at-law, is subject to garnishment before decree of distribution, and the suit may be continued until sufficient opportunity has been given for the settlement of accounts and a decree of distribution. *Stratton v. Ham*, 8 Ind., 84; *Wheeler v. Bowen*, 20 Pick., 563; *Holbrook v. Waters*, 19 id., 354; *Cady v. Comey*, 10 Met., 459. The R. S. of Mass. provide that any debt or legacy due from an administrator or executor may be attached by trustee process, but do not provide that it may be attached before an order of distribution. Our statute of garnishment is much broader than those of other states, subjecting to garnishment all persons except municipal corporations, and every kind of property known to the law, including money and debts due or to become due, with certain specified exceptions, viz., 1. Money owing by reason of any negotiable bill, draft, note or other security. 2. Money collected by force of execution or other legal process. 3. Money held by a public officer as such. The statute nowhere excepts executors and administrators from this process; and the court will not interpolate an exception. *Tarbox v. Adams Co.*, 34 Wis., 560. In this case it is found as a fact that the final order of distribution, requiring the garnishee to pay the principal debtor a legacy of \$400, was made long before the trial of this action. This court has held that it is enough that the money or debt is actually due and payable when the trial is had and the judgment rendered. *Prentiss v. Danaher*, 20 Wis., 311-319. The doctrine that an executor is a public officer was long since exploded. [To the latter proposition counsel cited numerous authorities.]

Geo. W. Burnell, for the respondent, to the point that an executor is not liable to be garnished for a legacy until after an order of final settlement and decree of distribution has been made by the probate court, cited *Drake on Attach.* (ed. of 1858), secs. 496-502; *Winchell v. Allen*, 1 Conn., 385; *Stanton v.*

The J. I. Case Threshing Machine Co. vs. Miracle, Ex'r, Garnishee.

Holmes, 4 Day, 87; *Barnes v. Treat*, 7 Mass., 271; *Brooks v. Cook*, 8 id., 246; *Stills v. Harmon*, 7 Cush., 406; *Parks v. Cushman*, 9 Vt., 320; *Adams v. Barrett*, 2 N. H., 374; *Waite v. Osborne*, 11 Me., 185; *Lyons v. Huston*, 2 Harr. (Del.), 349; *Shewell v. Keen*, 2 Whart., 332; *Thorn v. Woodruff*, 5 Ark., 55; *Curling v. Hyde*, 10 Mo., 374; *Richards v. Griggs*, 16 id., 416. When the liability is *contingent*, the garnishee is never held. Drake on Attach., secs. 545, 551; *Bishop v. Young*, 17 Wis., 46; *Keyes v. Railway Co.*, 25 id., 691; *St. Louis v. Regenfuss*, 28 id., 144. The liability of the garnishee is fixed at the time garnishment is served upon him, not by anything that happens after. *Bishop v. Young*, *supra*; *Wood v. Wall*, 24 Wis., 647. To put the law on this point beyond cavil, subd. 4, sec. 2769, R. S., declares that "no judgment shall be rendered upon a liability of the garnishee . . . by reason of any money or other thing owing from him to the defendant, unless before judgment against the defendant it shall have become due absolutely and without depending on any future contingency." Sec. 2768, indeed, makes the garnishee liable for "all debts due or to become due;" but this phrase has been construed by this court, in *Bishop v. Young*, *supra*, as relating to such debts "as the garnishee owes absolutely, though payable in the future," and not to such as depend upon a contingency.

LYON, J. The precise question presented by this appeal may be thus stated: Can a legacy to a judgment debtor be reached by garnishee process against the executor, issued and served before the final order of distribution; the trial of an issue taken upon the answer of the garnishee having been had after such order was made directing the executor to pay such legacy to the judgment debtor? The authorities are almost uniform that an executor or administrator is not liable to garnishee or trustee process before a final order for the distribution of the estate is made, unless he is rendered so liable by

The J. I. Case Threshing Machine Co. vs. Miracle, Ex'r, Garnishee.

some provision of statute. We have no statute in this state which takes such a case out of the general rule. Many of the cases which uphold this rule are cited in the brief of counsel for defendant. Indeed, we have been referred to but one case — *Stratton v. Ham*, 8 Ind., 84 — which holds the contrary rule. This is an exceptional case, and in a learned and elaborate note appended to it numerous cases are cited, and the unsoundness of the decision demonstrated on principle and by authority. Very many of the cases referred to were decided upon statutes not distinguishable from ours in principle, and the rule is too firmly established to be now overturned by judicial decision. That must be done, if done at all, by the legislature, as it has been in some of the states.

This court held, in *Hill v. Railroad Co.*, 14 Wis., 291, that a sheriff having moneys in his hands collected on execution in favor of a debtor, is not liable to garnishment. The reasons there given for the judgment are equally applicable to the case of an executor, especially before an order is made for the final distribution of the estate. See also *Burnham v. Fond du Lac*, 15 Wis., 193; *Buffham v. Racine*, 26 Wis., 449. True, DIXON, C. J., vigorously dissented from the doctrine of the court in the three cases last above cited; yet they must be regarded as settling a principle which is applicable to and must control our judgment in the present case. It must be held, therefore, that the executor, when summoned, was not liable to garnishment, and hence that the action against him fails. Manifestly it was not saved by the circumstance that the garnishee action remained in court until after the order of distribution. It is like the common case of an action prematurely brought. Such an action must abate, notwithstanding a cause of action has matured *pendente lite*. Whether the executor is liable to garnishment after the final order for settling and distributing the estate, is not here determined.

By the Court.—The judgment of the circuit court is affirmed.

Ault vs. Wheeler & Wilson Manuf'g Co.

AULT VS. WHEELER & WILSON MANUFACTURING COMPANY.

January 18 — February 7, 1882.

VERDICT. (1) *What questions to be submitted for special verdict.* (2) *Special and general verdicts.*CONVERSION: DEMAND. (3, 4) *When proof of demand necessary in action for conversion.*AMENDMENT: (5) *Of complaint after verdict.*

1. Questions of fact not controverted by the pleadings and evidence need not be submitted, where a special verdict is demanded.
2. Where there is a special verdict covering all material controverted issues, the taking of a general verdict consistent therewith is not error.
3. Where property is taken from the owner's home and possession upon authority of his wife only, and there is no evidence of her authority as agent for her husband in that behalf, *quære* whether an action for the value of the property will not lie without any *demand*.
4. In such an action, an answer alleging title in defendant would, if standing alone, operate as a waiver of a demand; but if there is also a general denial, perhaps, on failure to show a *tortious* taking; it might be necessary for plaintiff to show a demand before suit brought. In this case, however, a demand was conclusively proven.
5. The granting or refusing of leave to amend an answer after verdict is much in the discretion of the court; and where the question of fact sought to be raised by an amendment has been virtually determined against the defendant by special verdict, there is no error in refusing leave to amend.

APPEAL from the County Court of Winnebago County.

The case is thus stated by Mr. Justice TAYLOR:

"This was an action to recover the value of a sewing machine owned by the plaintiff, and which, it was alleged, had been converted by the defendant. The action was commenced in justice's court, and appealed to the county court of Winnebago county; and from the judgment in that court an appeal is taken to this court. The pleadings and evidence both show that the sewing machine in controversy was the property of the plaintiff at the time it came to the possession of the defendant company. The company claims title to it by

Ault vs. Wheeler & Wilson Manuf'g Co.

virtue of an exchange made by the wife of the plaintiff with the company for a new machine. The company, at the time of the trade with the plaintiff's wife, took a bill of sale from her for the machine in question, and the price agreed upon was applied in part payment for a machine which the company at the same time sold to the plaintiff's wife. The answer of the defendant, after admitting the fact of its being a corporation, (1) contains a general denial; (2) denies the ownership of the plaintiff, and alleges ownership in the defendant; (3) avers that the defendant purchased the machine of the plaintiff through his agent, the plaintiff's wife, in good faith and for a valuable consideration, and that the plaintiff authorized and sanctioned the sale; and (4) denies that the plaintiff demanded the property from the defendant before the commencement of the action.

"After the evidence was all taken, the defendant's attorneys demanded that the jury render a special verdict, and asked the court to submit for such special verdict thirteen questions which they had prepared and submitted to the court for that purpose. The court refused to submit the questions so prepared, and the counsel for the defendant excepted to such refusal. The court then prepared the following questions, and submitted them to the jury for their verdict: (1) At the time the contract was made between the plaintiff's wife and the defendant's agent, had the plaintiff any knowledge or information of the terms of the bargain between them? (2) Did the plaintiff, by his subsequent acts, ratify or assent to the sale made by his wife of the machine in controversy, under the terms of the contract? (3) What was the market value of the machine in controversy when it was taken by the defendant? The attorneys for the defendant excepted to the submission of these questions for special verdict — *first*, because the questions do not dispose of all the controverted facts litigated on the trial and material to the issue; and *second*, because said questions do not dispose of all the controverted

Ault vs. Wheeler & Wilson Manuf'g Co.

facts put in issue by the pleadings, and such as might properly be put in issue material thereto.

"To the first and second questions submitted to them, the jury answered, 'No;' to the third question they answered '\$30.' They also found a general verdict for the plaintiff, and assessed the damages at \$30."

From a judgment rendered in plaintiff's favor pursuant to the verdict, the defendant appealed.

For the appellant there was a brief by *Crozier & Tyrrell*, and oral argument by *Mr. Tyrrell*.

For the respondent there was a brief by *Houghton & Pors*, and oral argument by *Mr. Houghton*.

TAYLOR, J. The learned counsel for the appellant have filed a very elaborate brief in this case, and have very ably discussed several propositions of abstract principles of law, which were not considered by the learned county judge on the trial, because in his view of the evidence in the case they were not controverted facts. Among these propositions are three which the learned county judge withheld from the jury for the reason either that they were conclusively established by the evidence, or because there was no evidence to support them. Upon two of these questions—*first*, as to the ownership of the property in controversy, and *second*, as to the demand of the same from the defendant before suit brought,—the learned county judge held that there was no conflict in the evidence, and that both were clearly established; and upon the question as to whether the wife of the plaintiff was his authorized agent to sell or exchange the property, he held there was no evidence in the case to establish that fact. After a careful examination of the evidence found in the record, in connection with the issues formed by the pleadings, we are of the opinion that the learned county judge was right in holding as he did upon these questions. We are inclined to think that the learned counsel for the defendant, at the time of the trial, concurred

Ault vs. Wheeler & Wilson Manuf'g Co.

in the views taken by the county judge upon the question of ownership, and upon the question of the agency of the wife at the time of making the exchange, for the reason that we do not find in the thirteen questions which he proposed for a special verdict any one which asks the jury to pass upon these questions, or either of them. We find, however, that the defendant did ask to have the question of a demand submitted to the jury. We have some doubt whether a demand was necessary, in the absence of proof of any authority on the part of the wife to deliver the property to the defendant.

The property was taken from the house, and in law from the possession of the plaintiff, without any authority except that of his wife, and her authority is not proved on the trial. Under such circumstances it is probable that the taking was wrongful; but, admitting that the original taking was not tortious, we think, with the learned county judge, that the demand and refusal or neglect to deliver was conclusively proven on the trial. The answer of the defendant clearly shows that it claimed title to the property in hostility to the plaintiff's right, by pleading property in itself by a sale from the plaintiff through his agent. This answer, if standing alone, would do away with the necessity of any demand. It would in itself be evidence of a conversion, as against the right of the plaintiff, unless established by the proofs on the trial; but as the answer contained a general denial, and a denial that any demand of the property was made before suit brought, if the evidence failed to show a tortious taking, it would probably be necessary to show a demand of the property before suit brought. Without reciting the evidence as to the demand and refusal, we think the proof upon this point was conclusive, and the county court did not err in so holding.

The ownership of the property, the want of authority, at the time of the sale made by the plaintiff's wife, to make such sale, and the demand, being established beyond controversy, the only other questions in the case were, whether the plaintiff,

Ault vs. Wheeler & Wilson Manuf'g Co.

after the sale made by his wife, had ratified the same, and the value of the property; and these questions were submitted to the jury. The other question submitted went to the question of ratification. If, at the time the contract was made between the plaintiff's wife and the defendant's agent, the plaintiff had knowledge or information of the terms of the bargain between them, his omission to notify the defendant of his dissent to the trade for several weeks would be very strong evidence tending to show his acquiescence in the trade — much stronger than if he had no knowledge of its terms, or if he had been misinformed as to the terms. It is probable, if the jury had answered this question in the affirmative, the court would, as a matter of law, have held that his omission to notify the defendant of his dissent for several weeks, and permitting his wife during all that time to keep and use the machine taken in exchange, was a ratification of the trade made by her.

This court having held that only the controverted facts need be submitted to the jury for a special verdict (*Hutchinson v. Railway Co.*, 41 Wis., 552; *Williams v. Porter*, id., 422; *McNarra v. Railway Co.*, id., 69; *McHugh v. Railway Co.*, id., 79; *Ward v. Busack*, 46 id., 407; *Eberhardt v. Sanger*, 51 id., 72), we are of the opinion that the three questions submitted covered the whole case, and that there was no error in refusing to submit the questions prepared by the defendant.

We are at a loss to see how defendant is prejudiced by the fact that a general verdict was also taken by the court. The general verdict is not inconsistent with the special, and the special verdict covers all the controverted issues in the case. If there be any irregularity in taking a special and general verdict in the same case, it can only arise in a case where the special verdict does not dispose of all the controverted facts, and where it becomes necessary to help out the special verdict by a resort to the general one.

There was no error in refusing the amendment to the answer offered by the defendant. In the first place it was a

Ault vs. Wheeler & Wilson Manuf'g Co.

matter somewhat in the discretion of the trial court, whether it would permit an amendment at that stage of the trial; but in addition to that it seems to us that the question sought to be raised by the amended answer was, in fact, tried and submitted to the jury for their consideration, by the question which directed them to find whether the plaintiff had ratified the contract made by his wife, by his subsequent acts or assent to the sale made by her. If he had done such acts of omission or commission as would estop him from avoiding the contract made by his wife, such acts would amount to a ratification of her contract, and he would be bound by it. The defendant could not have been prejudiced by the refusal to allow the amended answer.

We think there was no error in refusing to instruct the jury that the plaintiff could only recover the market value of the machine. The property in question was of a kind for which there was no market value, in the strict sense of the word, and the true question for the jury was its intrinsic or real value. That value had been proven by men skilled in the knowledge of the value of such property; and such evidence was, in our opinion, the best evidence which could be furnished on that point.

On the whole, we think the case was fairly tried, and submitted to the jury under proper instructions from the court, and that the verdict is supported by the evidence.

By the Court.—The judgment of the county court is affirmed.

Trowbridge vs. Sickler.

TROWBRIDGE VS. SICKLER.

*January 18 — February 7, 1882.*FRAUDULENT SALES. (1, 2) *Question for jury.*EVIDENCE. (3) *Suppressing deposition for evasive or defective answers. (4) Whether witness may state who was "in possession" of chattels.*REVERSAL OF JUDGMENT: (5) *For want of definite instruction not asked.*

1. Under our statute, the question of a fraudulent intent in the transfer of personal (as well as real) property, is one of fact for the jury.
2. Whether the court would be authorized to take the question from the jury in any case, is not here decided, as there was evidence in this case to sustain the verdict upholding the transfer.
3. In the case of a deposition taken on oral interrogatories, upon notice, where the party in whose behalf cross interrogatories are to be put is not represented by attorney, but depends upon written interrogatories sent to the examining officer, the mere fact that some of the cross interrogatories are somewhat evasively or not fully answered, by reason of the neglect of such officer to press vigorously for full and exact answers, is not sufficient ground for *suppressing the deposition*; but this rule will not prevent the *striking out of an answer* which is not responsive or is purely evasive.
4. In replevin, a witness may properly testify that a particular person was "in possession" of the property at a specified time; and it is for the adverse party, by cross examination, to ascertain what facts within the witness's observation were regarded by him as constituting such "possession."
5. Where the instructions given are not incorrect, a mere omission to give a more definite instruction to which the appellant might have been entitled, but which he did not ask for, is not ground for reversal.

APPEAL from the Circuit Court for *Winnebago* County.

Action to recover certain personal property alleged to have been wrongfully taken by the defendant, as under sheriff of Fond du Lac county, on a writ of attachment issued in a suit in favor of John S. McDonald against George O. Trowbridge, a son of the plaintiff. The defendant, as such sheriff, justified on the ground that the property attached had been transferred by George O. to his mother, the plaintiff, with the intent to hinder, delay and defraud his creditors.

Trowbridge vs. Sickler.

Before the jury was impaneled, the defendant moved the court to suppress the deposition of the plaintiff taken in her own behalf, on the ground that the answers to the cross interrogatories were evasive, and in some instances wholly neglected to meet the point of the inquiry. He also moved on similar grounds to suppress the deposition of George O. Trowbridge, taken at plaintiff's instance. Both motions were denied.

The plaintiff had a verdict and judgment; and defendant appealed from the judgment.

Edw. S. Bragg, for the appellant.

Geo. E. Sutherland, for the respondent.

CASSODAY, J. This case has been here twice before. 42 Wis., 417; 48 Wis., 424.

1. Is there evidence sufficient to support the verdict? Beyond question the learned counsel is correct in claiming that there were several suspicious circumstances connected with the transfer of the property in question from the son to the mother. Were we sitting as jurors on the facts, we should probably be inclined to hold with him. We have no time to go into an analysis of the testimony, and an incumbrance of the reports for that purpose would be of no practical benefit to any one, even if it would be more satisfactory to the parties. From a careful reading of the testimony we think there was sufficient evidence to support the verdict. Whatever may have been the rule at common law, the statute of this state makes the question of fraudulent intent in the transfer of personal as well as real property a question of fact for the jury, and not of law for the court. *Hyde v. Chapman*, 33 Wis., 392; *Barkow v. Sanger*, 47 Wis., 500; *Mehlhop v. Pettibone*.¹ Whether, under this statute, as queried in *Barkow v. Sanger*, the court would be authorized to take the case from the jury where there is no evidence nor inference disclosed of the *bona fides* of the

¹ This case was held on a motion for a rehearing, and will be reported as of May 10, 1882.

Trowbridge vs. Sickler.

transaction, it is unnecessary here to decide, since we are of the opinion that there was sufficient evidence to justify a verdict for the plaintiff. For an interesting discussion of the question, see *Seward v. Jackson*, 8 Cow., 435, reversing *S. C.*, 5 Cow., 67; *Van Wyck v. Seward*, 18 Wend., 375; *Babcock v. Eckler*, 24 N. Y., 623.

2. Was there any error in refusing to suppress the depositions? The depositions were not taken on commission, but were taken before an officer in Oakland, California, on oral interrogatories, in pursuance of notice in writing previously given. The only grounds urged for suppression were, that the answers to several of the cross interrogatories were evasive, and that in some instances the witness had wholly failed to answer the point in the interrogatory. The statute requires the officer taking the deposition to insert therein every answer or declaration of the witness which either party requires to be inserted; and, in depositions taken by oral interrogatories, every interrogatory so required. Section 4087, R. S. The manner of suppressing depositions is regulated by section 4091, R. S. Section 4092, R. S., provides that "every objection to the competency of the witness, or to the propriety of any question put to him, or the admissibility of any testimony given by him, may be made when the deposition is produced, in the same manner as if the witness were personally examined on the trial, and without being noted upon the deposition, unless the objection is to the form or order of a question, when the objection must be noted in the deposition before it is answered." This section authorizes an objection to be taken for the first time at the trial to an inadmissible answer to an interrogatory; but we do not think the whole deposition should be suppressed merely because some of the answers are not as full or direct as they might have been. This is especially true in regard to depositions taken, as these were, on oral interrogatories.

When depositions are so taken, parties are expected to be

Trowbridge vs. Sickler.

present by their attorneys or their representatives, and if the answers are evasive, or not so full and complete as desired, they can repeat the questions or put others until the witness is forced to answer the precise point required, or squarely refuse. Of course, refusal or evasion might be so gross as to indicate corruption, and authorize a suppression of the whole deposition; but when the deposition is upon oral interrogatories the witness should be fairly tested by repeated questions until the perversity of the witness becomes manifest, before the court would be authorized to resort to so severe a practice. Here the plaintiff appeared by attorney, and the defendant sent written interrogatories to the officer to be put to the witness by such officer. He did put the questions as requested, and in doing so he undoubtedly represented the defendant. If a given interrogatory, and especially one involving several questions, was not fully or was evasively answered, he might have repeated it, and called attention of the witness to the particular part of the interrogatory not answered, or to the part wherein a direct answer had been evaded. The motion to suppress, therefore, is really grounded upon the failure of defendant's chosen agency to more vigorously press the different questions prepared for him in advance to be put to the witnesses. That such failure is not a ground for such motion is manifest. Of course, this rule does not prevent the striking out of an answer which is not responsive or is purely evasive. But no such motion was made as to any answer of any cross interrogatory. Counsel did not ask to have this answer of George O. stricken out: "When it was seized by the defendant, it was in the possession of Eliza Trowbridge." But we think that possession of movable personal property, like that in question, is, as a general thing, a question of fact so far as to be testified to by a witness. It may, in a strict sense, be regarded as a conclusion from several facts. But counsel was at liberty to cross-examine the witness, and force him to state just what particular facts he regarded as consti-

Trowbridge vs. Sickler.

tuting such possession. It may be that what he called possession would not in law be regarded as possession, but that would not be a ground for striking out the answer; for one of the purposes of cross examination is to detect and expose the fallacy of statements made on direct examination. For similar reasons we think the court was justified in disregarding the objection to the striking out the answer, "It was given to her."

The defendant excepts to so much of the charge as states the following proposition of law as applicable to the facts in this case: "It has been claimed here, on the part of the plaintiff or defendant, that at the same time the farm on which this stock was, was sold. Now I must say to you that, if the party took possession of the farm, it would not be evidence of a want of change of possession that the property remained on the farm; because, in taking possession of the farm and the stock upon it, the fact that the stock was there and still remained there, providing the purchaser took possession of the farm and the stock, there would be no necessity of removing it from the land; but you must examine all the circumstances, all the surroundings, and you may bring to your aid in determining this question other transactions between these same parties,—*the transaction of the purchase of the land, the giving of a mortgage, its cancellation, all the other surrounding circumstances*,—and determine this question I have submitted to you." But we think this portion of the charge was, to that extent, a fair presentation of the case to the jury. If the defendant desired to have instructions more definite, he should have so requested. This court has often held that a failure to so request is a waiver of any exceptions because they are not given. Besides, the court had already fully instructed the jury as to the presumptions of law in favor of the defendant.

The defendant also excepts to so much of the said charge as states the following proposition as applicable to the facts

Ladwig and another vs. Haase.

in the case: "It would not, however, be sufficient to show that another transaction between these parties was fraudulent, and therefore void as against creditors, to establish the fact that this one was void. It has that tendency, and is a circumstance; but even though you should find the other transaction to have been fraudulent, if you find, from all the evidence, that this one was not — that this was *bona fide*, made without intent to defraud or delay or hinder creditors, made for a valuable consideration — that there was a change of possession, or, if there was not, if it is established that the transaction was *bona fide*, and made without any fraudulent intent, made in good faith, — then, [notwithstanding] the fact that the other transaction was fraudulent, you still might find that this one was not." Counsel urge that this instruction took from the jury the question whether one of the transactions referred to was or was not fraudulent. But it seems to us that it was not obnoxious to this objection. On the contrary, we think it fairly submitted to the jury the fraudulent character of each of the transactions, and their bearing upon each other. This is so manifest from the reading as not to require discussion.

By the Court. — The judgment of the circuit court is affirmed.

TAYLOR, J., took no part.

LADWIG and another vs. HAASE.

January 19 — February 7, 1882.

Reformation of Lease.

The court will not insert in a lease important conditions which the parties never fully assented to; and there is no sufficient evidence in this case that the alleged agreement on defendant's part on which the action is based, formed part of the lease counted upon.

Ladwig and another vs. Haase.

APPEAL from the County Court of *Dodge County*.

The complaint alleges that about the 1st of October, 1877, the plaintiff *Sophia Ladwig* and the defendant entered into an agreement by which the latter was to work a farm belonging to the former in accordance with the terms and conditions of a written memorandum attached to the complaint; that defendant thereupon entered upon and worked said plaintiff's farm, from year to year for about three years, in accordance with said terms and conditions, except that he had failed and refused to plow and leave plowed the number of acres of said farm (to wit, about sixty-five acres) which he had agreed to plow and leave plowed on said farm at the expiration of the term of his lease, to plaintiff's damage \$200. *Carl Ladwig* was joined as plaintiff as the husband of *Sophia Ladwig*. The memorandum attached to the complaint, and put in evidence on the trial, was of a lease of land by *Sophia Ladwig* to the defendant for three years from October 1, 1877, with numerous agreements on the part of the defendant, of which the only one important here was as follows: "The lessee further agrees to deliver to the lessor the land in such order as when he took possession of it, that is to say, to deliver the plow-land plowed in the fall, on the 1st of October, 1880." The evidence as to the person by whom and the circumstances under which this memorandum was made, is sufficiently stated in the opinion. The cause was tried by the court without a jury, and judgment rendered for the defendant, from which the plaintiffs appealed.

The cause was submitted for the appellants on the brief of *J. J. Dick*.

Harlow Pease, for the respondent.

COLE, C. J. The county court found as a fact in the case, that the defendant never made any contract with the plaintiffs, or either of them, to plow any of the land in question in the year 1880. This finding is abundantly sustained by the evi-

 Black River Flooding-Dam Ass'n vs. Ketchum and others.

dence, and cannot be disturbed. The plaintiff's own witness, Lembgen, who drew up the unexecuted agreement or memorandum, testifies that he did not write a word in the draft about plowing until December, 1879, more than two years after the parties came to him to have a written lease drawn. Then, he says, he added that clause to the memorandum or draft which he had made, at the request of *Mr. Ludwig*, in the absence of the defendant, and without his knowledge. Aside from the written draft the witness was not able to state, with any confidence, the terms of the original agreement; and the only conclusion which can be drawn from his testimony is, that the parties never completed their agreement. It is certainly not the province of the court to supply important conditions in the lease, which the parties never fully assented to. We can only hold upon the evidence, with the learned county court, that the defendant never made any agreement to do the plowing, as is alleged in the complaint. This view disposes of the case, and it is not necessary to consider the other questions discussed by counsel.

By the Court.—The judgment of the county court is affirmed.

 BLACK RIVER FLOODING-DAM ASSOCIATION vs. KETCHUM and others.

January 20—February 7, 1882.

PRIVATE CORPORATIONS: IMPROVEMENT OF NAVIGABLE RIVERS. (1) *Right to improve navigable stream, statutory.* (2, 3) *Plaintiff's rights in respect to improvement of Black river: Alleged conflict between special charter and general law.*

1. The plaintiff corporation has no right to charge tolls upon logs run or driven upon the Black river (a navigable stream), unless such right is conferred upon it by statute.
2. Chapter 86, R. S., under which the plaintiff was organized, did not affect

Black River Flooding-Dam Ass'n vs. Ketchum and others.

in any way the authority previously granted the Black River Improvement Company to improve said river throughout its whole length, and to charge tolls on logs, etc., transported therein (which grant included the right to erect flooding dams).

3. Said improvement company having taken and retained possession of at least a part of said river for the purpose of improving its navigability, the plaintiff company did not and could not thereafter take any authority, under the terms of said chapter 86, to improve *any part* of the same stream (as by its flooding dams), and charge tolls therefor.

APPEAL from the Circuit Court for *La Crosse* County.

The plaintiff appealed from a judgment in favor of the defendant. The case is sufficiently stated in the opinion.

For the appellant there was a brief by *Cameron, Losey & Bunn*, and oral argument by *Mr. Bunn*. They contended that the Black River Improvement Company is an improvement company, and nothing more. It had power to levy a tariff or toll upon logs driven down the stream after it had spent a certain sum in improvements; but it had no power to drive logs, and no franchise to collect charges or tolls for driving. Under its charter it could construct only such dams as appertain to simple improvement of the channel of the river. It had no authority to erect structures such as flooding dams, which are auxiliary to the right to drive logs, and only valuable as they are operated by a driving company in connection with other active driving operations. And it had no possession of the Black river for that purpose. Secs. 1771, 1777, R. S., authorize corporations for improvement and driving on all the streams not before occupied by corporations having power to *improve and drive*. No mere prior possession for half of this purpose excludes the corporation. The prior possession must be for the whole purpose, must cover the whole ground. The Black River Improvement Company had no possession of the stream. The stream is incapable of any possession, technically speaking. We are dealing with incorporeal rights, with franchises; and the possession spoken of in the statute does not mean a technical *pedis possessio*. It refers to a pre-

Black River Flooding-Dam Ass'n vs. Ketchum and others.

vious conflicting franchise. A prior right to make improvements on the river and charge tolls when a certain sum is invested, is not exclusive of a subsequent right to drive and improve the river, charging tolls when driving is made reasonably practicable and certain.

For the respondents there was a brief by *M. P. Wing* and *G. C. Prentiss*, and oral argument by *Mr. Prentiss*.

ORTON, J. This suit is to enforce a lien for tolls upon the logs of the defendants, driven or run down Black river below the flooding dams of the plaintiff in the spring of 1880. The plaintiff corporation was organized under chapter 86, R. S., and particularly under section 1777, which authorizes the corporation, when formed for the improvement of any stream and driving logs thereon, and *which shall have taken prior possession of such stream* for that purpose, to improve such stream and its tributaries, etc., by certain means and in certain ways, including "the erection of rolling and *flooding dams*."

The purpose of the corporation, as expressed in its articles of association, is "the improvement of Black river and the driving of logs and timber thereon." The Black River Improvement Company was organized and commenced their works on said river in 1864, under a special charter granted by the legislature of that year, and was authorized "to improve the navigation of Black river and lakes near the mouth of the same, in the counties of Clark, Jackson, Trempealeau and La Crosse, by removing obstructions, *building dams*, breaking jams, deepening, widening and straightening the channel, closing up chutes and side-cuts leading from said river into the Mississippi river, and into the bottom lands of said river, and into sloughs; to erect booms and piers, to construct levees or dikes, and repair and straighten the banks of **Black river;**" and the company were authorized to prescribe a tariff of ~~tolls for running~~ logs, boards, etc., after \$5,000 had been expended in the improvement.

This company, by sufficient expenditure of money in im-

Black River Flooding-Dam Ass'n vs. Ketchum and others.

proving the river, very soon became authorized to charge tolls, and has continued from time to time to improve the river at various places and in various ways, and charge tolls on all logs, timber and lumber passing down the same, since the year 1864. The plaintiff company, soon after its organization, built and constructed certain flooding dams across said river, but towards the head-waters thereof, and above the works of said improvement company, by means of which the logs and timber of the defendants were, perhaps, more easily run down said river, although coming into the river below said dams. The evidence tends to show that the plaintiff rendered no services to the said defendants in personally running, driving and handling said logs, and that they came into the main channel of the river about four miles below the lowest dam of the plaintiff.

The main question in the case is, therefore, whether the plaintiff company had a right to charge tolls on the defendants' logs so run in the said river because of their pretended improvement of it by means of their flooding dams. The right of the plaintiff to charge tolls for actually driving, or assisting in driving, logs down the river, is not contested in this case. Most of the important questions upon which the decision of this main question depends, have been decided by this court in the case of *Black River Improvement Co. v. La Crosse Booming and Transportation Co.*, and the opinion of Mr. Justice TAYLOR therein, filed herewith, will more fully examine and discuss them in the light of the authorities.¹ The decision of the same questions in this case will be, therefore, only briefly stated:

First. The Black river is a navigable stream, and plaintiff, as a corporation, has, therefore, no right to charge tolls upon logs run or driven thereon, unless such right is directly conferred by the state through its legislature.

Second. The plaintiff corporation was organized under the

¹ The case referred to was held on a motion for a rehearing, and will be reported as of May 10, 1882.

Black River Flooding-Dam Ass'n vs. Ketchum and others.

general law found in chapter 86, R. S., and that law does not repeal, take away or abridge the right and authority of the Black River Improvement Company, under their special charter of 1864, to improve that river throughout, and to charge tolls on logs, timber and lumber transported on the same.

Third. The Black River Improvement Company took possession of the entire stream, soon after its organization, for all the purposes of improving its navigability and use, and has retained such full possession for such purposes ever since.

Fourth. Section 1777, under which the plaintiff corporation was organized, confers no right or authority upon any corporation organized under that chapter to improve any stream, unless such corporation has taken *prior* possession of such stream. The stream is mentioned as an entirety, and the corporation must have taken prior possession of the *entire* stream. So that it makes no difference as to the right of this plaintiff, whether the improvement company were in possession of the entire stream, or in the actual possession of that particular part of it where the plaintiff's flooding dams were constructed, or not. The plaintiff company must have had the right to take possession, and must have actually taken entire possession, of the entire stream, or it has no right to improve the stream and charge tolls. It follows that the plaintiff had no right or authority to improve the Black river, or any part of it, and charge tolls on account of the same.

Fifth. The plaintiff's flooding dams are in their nature an improvement of the navigability and common use of the river, and, in respect to the tolls sought to be enforced upon the defendants' logs in this case, they must be treated as an improvement of the river in the meaning of the statute. It is immaterial, perhaps, for the purposes of this case, whether the Black River Improvement Company has the right under its charter to construct such flooding dams as a part of their improvements, for we have seen the plaintiff has no such right; but we think it clear, from the terms of its charter and the

The State ex rel. Hudd vs. Timme, Secretary of State.

amendment of 1866, it had the right to build such and similar structures if deemed necessary to aid in the improvement of the stream.

The conclusion from all of these propositions is, that the plaintiff had no right to the tolls for which this suit is brought.

I might as well, and perhaps better, have adopted the able opinion of his honor the circuit judge before whom this case was tried; but I adopted this method of announcing the mere points of our decision, following substantially that opinion, for the sake of brevity, as the more important and leading case above referred to contains the discussion of most of these questions and a citation of the authorities.

By the Court.—The judgment of the circuit court is affirmed.

THE STATE ex rel. HUDD vs. TIMME, Secretary of State.

February 16 — February 21, 1882.

CONSTITUTIONAL LAW. (1) *Mode of amending the state constitution.* (2) *When several propositions may constitute one amendment.* (3) *Amendment of 1881 valid.* (4) *When such amendment takes full effect.*

1. No amendment can be made to the constitution of this state [in the absence of a constitutional convention] without a compliance with the provisions of sec. 1, art. XII thereof, both in the passage of such amendment by the legislature and in the manner of submitting it to the people.
2. It is within the discretion of the legislature to submit several distinct propositions to the people as "one amendment," within the meaning of said sec. 1, art. XII, if such propositions relate to the same subject and are all designed to accomplish one purpose.
3. The several propositions submitted in 1881 all relate to a change from annual to biennial sessions of the legislature, and were intended to effect such a change; and they were properly submitted as a single amendment, and were adopted as such.
4. Said amendment cannot go into effect until an election of members of the assembly and of senators from the odd-numbered districts shall have

The State ex rel. Hudd vs. Timme, Secretary of State.

been held in November, 1882, and the legislature shall have fixed the time when sessions of the biennial legislature shall be held; and members of the legislature heretofore elected hold under the old provisions of the constitution, and the compensation to which they are entitled is that prescribed by those provisions.

MANDAMUS. This court having issued its alternative writ commanding the secretary of state to audit the relator's salary as a state senator at the sum of \$500, or show cause, etc., the attorney general moved to quash the writ.

The Attorney General, for the motion:

I. The legislature is the body which, in all cases, must first pass upon the question whether it is one or more than one amendment, within the meaning of sec. 1, art. XII of the constitution, which is about to be submitted to the people. The uniform action of fourteen legislatures has been to treat every amendment to an article which treats of a particular subject, such as Legislative, Executive, Judiciary, Finance, Corporations, etc., as but one amendment, no matter how many different provisions or sections it may contain. See the amendment to art. IV, by adding sec. 31, which was submitted and adopted as one amendment, though changing the constitution in nine different respects or upon nine different subjects which have no connection with or relation to each other, except that they all pertain to the "Legislative" department; also the amendments to sec. 3, art. XI, secs. 5 and 9, art. V, sec. 2, art. VIII, sec. 4, art. VII, and the former amendment to sec. 21, art. IV. Such construction by the legislature has for fifteen years been approved and acquiesced in by the people and by all branches of the state government. This uniform construction and long acquiescence and practice ought to be conclusive. *Harrington v. Smith*, 28 Wis., 43, 68-9; *Scanlan v. Childs*, 33 id., 663, 666; *Prohibitory Amendment Cases*, 24 Kan., 700, 717-720. "The united understanding and action of the whole state in a matter of great public interest is a guide that any tribunal may safely follow." Stow,

The State ex rel. Hudd vs. Timme, Secretary of State.

C. J., in *State ex rel. Bond v. French*, 2 Pin., 184. If it can be said that the intent of the framers of the constitution is even doubtful on the question whether every distinct proposition submitted is a distinct amendment and should be submitted as such, the broader construction is, that every such proposition is not an amendment within the meaning of that instrument; and, "where the intention of the framers of the constitution is doubtful, the people, assuming power under the broader construction, should have the benefit of the doubt." Jameson on Const. Convention, sec. 573. That the legislatures of 1880 and 1881 considered the several amendments under consideration one entire and inseparable proposition, is evident from the fact that both legislatures considered and voted on the whole together, and the legislature of 1881 submitted the whole together as a single scheme for the establishment of biennial sessions. It never occurred to those legislatures or to the people who ratified the amendments so submitted, that any other body of men should receive the \$500 salary than the members who were to compose such biennial legislature. In construing a constitutional provision we are to be governed by the same rules of interpretation which prevail in relation to statutes. *State ex rel. Bond v. French*, 2 Pin., 184. The surrounding circumstances, the condition of things, the evils to be remedied and the objects to be attained, are all to be considered. *Clark v. City of Janesville*, 10 Wis., 135; *Harrington v. Smith*, 28 id., 59, 67-8. The cases construing the term "one subject," as used in sec. 18, art. IV of the constitution, may afford some light on the question what constitutes "more than one amendment" within the meaning of sec. 1, art. XII. *Mills v. Charleton*, 29 Wis., 400; *Phillips v. Town of Albany*, 28 id., 340, 356. II. The amendments under consideration, aiming at the single object of "biennial sessions," and being but a single proposition, must take effect together and not by piecemeal. The amendments to secs. 4 and 5 cannot by their terms take

The State ex rel. Hudd vs. Timme, Secretary of State.

effect until a year after their adoption. The amendment to sec. 11 evidently refers to a future provision by law for the time of meeting of the legislature. The term "regular session" in the amendment to sec. 21 refers to the meeting of the legislature "once in two years and not oftener," as provided in sec. 11; and sec. 21, as amended, provides a salary of \$500 for such "regular session," instead of the \$350 formerly given "*per annum*." Until the election of members under secs. 4 and 5, there are no persons who can claim the salary fixed by sec. 21. It is evident that the legislature would not have submitted nor the people adopted the amendment increasing the salary, except as a part of the biennial system. See *Slauson v. City of Racine*, 13 Wis., 398, 404-6; *Warren v. Mayor, etc.*, 2 Gray, 84, 98-100.

H. W. Chynoweth, Assistant Attorney General, on the same side:

The term "amendment" in art. XII of the constitution means amendment to subject matter. The amendments in question all necessarily refer to one subject matter, i. e., biennial sessions of the legislature, and are to be construed as one amendment. All of the provisions contained in the different sections of such amendment are to be construed as applying only to its subject matter. *McHugh v. Timlin*, 20 Wis., 487; *Woodbury v. Shackelford*, 19 id., 55. And the whole amendment takes effect at the same time. *Real v. The People*, 42 N. Y., 270. The amendment does not take effect until after an election under it, and up to that time the constitution, as it was before the amendment was proposed, and the laws made under it, govern and control in all things. The provisions of the old constitution all remain in force until they are superseded by the practical operation of the provisions of the new, in conflict therewith. *Opinions of the Justices*, 3 Gray, 601; *S. C.*, cited and approved in *Day v. Bardwell*, 97 Mass., 246; *State v. Scott*, 9 Ark., 270; *State ex rel. Richardson v. Ewing*, 17 Mo., 515; *State ex rel. Dunning v. Giles*, 2 Pin., 166;

The State ex rel. Hudd vs. Timme, Secretary of State.

State ex rel. Varney v. Wyman, id., 360; *State ex rel. Wise v. Button*, 25 Wis., 109; *Chahoon's Case*, 20 Gratt., 733; *Supervisors of Doddridge v. Stout*, 9 W. Va., 703; *People ex rel. Davis v. Gardner*, 59 Barb., 198; *S. C.*, 45 N. Y., 812; *Real v. People*, 42 id., 270.

Thomas R. Hudd, the relator, in person:

Sec. 21, art. IV of the constitution, fixing the compensation of members of the legislature, was amended at the election in November, 1867. At the same election this relator was returned to one branch of the legislature, and drew pay under the section as amended, as did also sixteen senators who were elected in 1867, and seventeen senators who had been elected in 1866. No question was then made but that the amendment took effect at once as to all members of the legislature of 1868 then or previously elected. At the election in November, 1881, the same section was again amended, and the relator, as a member of the legislature of 1882, claims to be entitled to the salary which the constitution so amended prescribes. If, as argued, this amendment is but a part of the new proposed biennial system, and it was intended that the salary of \$500 should be paid only for a biennial session, under what provision of law can the members of this legislature be paid? There can be no question that this is a "regular session" of the legislature. The right of members of this legislature to receive \$350 died with the adoption of the amendment, which was prior to the commencement of their term of office. The amended section became a substitute for the former section, and worked its repeal. *State v. Campbell*, 44 Wis., 529; *Lewis v. Stout*, 22 id., 234; *Burlander v. M. & St. P. Railway Co.*, 26 id., 76; *Simmons v. Bradley*, 27 id., 689; *Moore v. S. & St. C. R. R. Co.*, 34 id., 173; *Oleson v. G. B. & L. P. Railway Co.*, 36 id., 383; *Matter of Executive Communication*, 15 Fla., 735. Sec. 1, art. XII of the constitution, provides that all amendments submitted to vote of the people shall, if approved and

The State ex rel. Hudd vs. Timme, Secretary of State.

ratified, become a part of the constitution. There is nothing in sec. 21, art. IV, as amended, to indicate that it was not to take effect at once. And no legislation was needed for its full and complete operation. Nor did its operation depend, in any way, upon the adoption of the other amendments submitted to the people at the same time. Each of these amendments was a distinct and independent proposition, and any one of them might have been adopted or rejected without affecting the others. The language of the section in question is plain and unambiguous, and from it alone the intent is to be ascertained. 1 Story on Const., sec. 401; *Ogden v. Glidden*, 9 Wis., 46; *Blunt v. Walker*, 11 id., 334; *Woodbury v. Shackelford*, 19 id., 55; *Brightman v. Kirner*, 22 id., 54; id., 660; *Nichols v. Halliday*, 27 id., 406; id., 478; Cooley's Con. Lim., ch. 4; Potter's Dwaris on Stat., ch. 19; *Settle v. Van Evrea*, 49 N. Y., 280; *Hawkins v. Carroll Co.*, 50 Miss., 738. See 50 Ill., 86; *Beardstown v. Virginia*, 76 id., 34; *Hills v. Chicago*, 60 id., 86. It cannot be argued that the increase of salary was made only in view of the extra labor incident to a biennial session, and was therefore only payable for such a session. Considerable perquisites in the shape of stationery, stamps, etc., are cut off by the amendment, and the increase of pay may have been made in lieu thereof.

Wm. F. Vilas, as *amicus curiæ*:

1. Each and all of the provisions of sec. 1, art. XII of the constitution, prescribing the manner in which amendment of that instrument may be made without a convention of the people, are mandatory, not directory, and a failure to comply with any of the requirements thereof renders the attempt nugatory and void. *Collier v. Frierson*, 24 Ala., 100; *Opinion of the Judges*, 6 Cush., 573; *Durkee v. Janesville*, 26 Wis., 697; *State v. Swift*, 69 Ind., 518; Cooley's Con. Lim., 30. 2. The constitution is unmistakable in its mandate, "that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such

The State ex rel. Hudd vs. Timme, Secretary of State.

amendments separately." This provision needs no comment to show its value and importance. It is found in the constitutions of as many as twelve of the states of the Union. 3. That, instead of one, several amendments were proposed and submitted to the people by ch. 262, Laws of 1881, seems an unanswerable proposition, notwithstanding the concurrence of the legislature and the attorneys-general in the contrary view. It is proposed, 1. To change the time of election and duration of the term of office of members of the assembly. 2. To do the like for senators. 3. To limit the legislative regular sessions to one every two years. 4. To alter the compensation of members. It is apparent on a moment's reflection that either one of these might be independently done. With the exception that the first and third seem naturally to go together, although not necessarily, there is no specially plausible connection between them. But especially the salary provision is independent. Suppose the proposed change had been to make the payment \$1,000 or \$2,000? And that has been once before amended independently. What shall we say of the supposed amendment of 1867, fixing the pay of members at \$350 per annum and mileage? Was that not an amendment? If it was, is it not an amendment to now make it \$500? Or was the first but a fourth of an amendment? Would it not be competent to provide for biennial sessions and still elect senators once in two years? But it is said, these amendments are all so connected in substance and as relating to one end, that they must be treated as one. Such a view destroys the constitution. Say that you propose an amendment to the powers of the legislature, and you can alter the whole of art. IV and sweep the bill of rights into one cauldron. Say but that you will amend the constitution in respect to the judiciary, and this court, the circuit courts and all inferior magistrates are confounded in an indiscriminate mass. This subject has received no judicial exposition of much value. So far as there is authority, or the look of it, it is with the view contended for.

The State ex rel. Hudd vs. Timme, Secretary of State.

Similar purposes were sought to be reached in Alabama. Eight sections received each slight alterations. The court declared them eight amendments. *Collier v. Frierson, supra.*

TAYLOR, J. The relator asks this court to issue its writ of *mandamus* directing the secretary of state to audit his salary as a state senator at the sum of \$500, and he bases his claim to that salary on the amendment of the constitution of the state adopted at the last general election, and commonly known as the biennial sessions amendment. The relator claims that the old provision of the constitution fixing the salary of senators and members of the assembly at the sum of \$350, was abrogated by the adoption of the constitutional amendment referred to, at the moment it was adopted by the people, and that the amendment fixing the salary at \$500 took effect from that date, and is the only provision of the constitution now in force fixing the salary of senators, and if they are not entitled to the sum of \$500 they are not entitled to any salary.

On the part of the state, the learned attorney general insists that the amendment of the constitution fixing the salary of senators and members of the assembly was a part of the plan for changing from annual to biennial sessions of the legislature, and that the salary mentioned in the amendment was clearly intended to be given only to such senators and members of the assembly as should be elected after the amendment took effect, and to those who should hold over under the second provision of the amendment, and who would become members of the legislature under the constitution as amended, and members of a legislature whose sessions were biennial instead of annual.

This amendment has been the subject of considerable criticism, because it did not provide more specifically when the new system should go into effect, and also for not declaring in express terms that the old system of things should remain in force until a legislature was elected and convened under the

The State ex rel. Hudd vs. Timme, Secretary of State.

new. It is certain that much discussion and considerable doubt would have been prevented if these matters had been more specifically provided for in the amendment.

It is our duty to examine and construe the amendment as it has been adopted by the legislature and the people, and give it effect, if we can, without interrupting the harmonious action of the government until such time as its provisions can be carried into effect by proper action under it. That it was not expected or intended that the provisions of the amendment should go into effect, practically, immediately upon its adoption by the people, seems to us very clear from a mere reading of its provisions. It *first* provides that members of the assembly shall be chosen biennially by single districts, on the Tuesday succeeding the first Monday of November after the adoption of this amendment; *secondly*, that the senators are to be chosen at the same time and in the same manner as the members of the assembly, except that they shall be chosen alternately in the odd and even numbered districts, and that all senators elected after the adoption of the amendment shall hold their offices for four years, and that the senators elected or holding over at the time of the adoption of the amendment shall continue in office till their successors are duly elected and qualified; *thirdly*, that the legislature shall meet at the seat of government, at such time *as shall be provided by law*, once in two years, and no oftener, etc.; and *fourthly*, that their compensation, by way of salary, shall be \$500; and it cuts off certain perquisites which are now received by the members of the legislature.

In giving construction to these provisions we must look at the state of things existing at the time of their adoption, and they must be considered in connection with the proposed change. At the time of their adoption the constitution provided for annual sessions of the legislature, and for an election of members of the assembly, and of half the senators, on the same day that these amendments were submitted to and voted

The State ex rel. Hudd vs. Timme, Secretary of State.

upon by the people. It would be absurd to hold that there was any intention, on the part of either the legislature or the people, to interrupt the regular course of government of the state by the adoption of these amendments. It is very clear, we think, that it was contemplated that members and senators would be elected as usual on the day the vote was taken on the amendment, and that the legislature would meet on the day prescribed by the constitutional provision and the law then in force upon that subject. This is evident from the fact that the amendment provides that the senators *elected or holding over at the time* of the adoption of this amendment shall continue in office till their successors are duly elected and qualified. This provision clearly contemplated that the senators and members of assembly elected the same day the vote on the amendment was taken, should remain in office until their successors should be elected at the first election under the amendment. From this fact it is evident that the amendment clearly contemplates the existence of a constitutional legislature, after its adoption, which would be composed of the senators and members chosen at such election and not under the provisions of the amendment. This is further made clear from the third provision, which declares that "the legislature shall meet at the seat of government, at such time as shall be provided by law, once in two years and no oftener," etc.

These provisions contemplate that there would be a constitutional law-making body in the state after the adoption of the amendment, and before any legislature could be elected or convene under it. There can be, we think, no doubt but that the legislature in passing, and the people in ratifying, the amendment contemplated and intended that the old system of things should remain in full force until an election could take place under the new. Any other construction of the amendment would be in plain contradiction of its terms, and would render it impossible to put its provisions into practical effect. To hold that these amendments took effect immediately on

The State ex rel. Hudd vs. Timme, Secretary of State.

their adoption, so as to absolutely abolish the present provisions of the constitution for all purposes, would compel us to hold that the present legislature was not a constitutional body, and that all its proceedings were absolutely void. We think no such construction is required from the language used in the amendments; and it is very clear that such was not the intention either of the legislature or the people. Fortunately we are not without authority upon a question which involves such serious consequences; and we are indebted to the careful research of the learned attorney general and his assistant for presenting them upon the hearing. The question as to the time when a constitutional amendment shall go into effect, and what effect its adoption shall have upon the existing state of things, has received the careful consideration of the learned judges of the supreme court of Massachusetts, in an opinion found in 3 Gray, 601. Under the constitution of that state the judges were called upon by the governor to give their opinion upon several questions propounded to them, as to the effect which certain amendments of the constitution of that state had upon the tenure of office of certain officers in office at the time they were adopted. It appears that previous to the adoption of the amendments to the constitution of that state, in 1855, the executive councilors were not elected by the people; neither were the secretary, treasurer, auditor or attorney general, and certain county officers. The amendments provided that these officers should thereafter be elected by the electors of the state. The first questions submitted read as follows:

“What is the effect, if any, of the third article of the amendment of the constitution this year adopted, upon the tenure of office of the present executive council? Will the said article affect the manner of the election of the next executive council? Under which system must vacancies in the council be filled? If under the old, up to what time?”

The learned judges start out with the proposition that the

The State ex rel. Hudd vs. Timme, Secretary of State.

amendments, "so far as they are inconsistent with the previous provisions of the constitution, vacate and annul them, but in all other respects the former provisions remain in force," and then proceed to say:

"In answer to the first question, we are of the opinion that the third article of these amendments will have no effect whatever upon the tenure of office of the present members of the executive council. Even if no legislative action were necessary, there could be no election of councilors until the Tuesday next after the first Monday of November, 1855, and the councilors then chosen cannot enter upon the duties of their offices until the first Wednesday of January, 1856; at which time, or as soon thereafter as others are chosen and qualified in their places, the offices of the present council will cease. The present amendment contains no express repeal of preëxisting provisions of the constitution; it repeals them by necessary implication by providing another and different mode of filling these offices, *but it cannot have that effect until it comes practically in operation.*

"But there is another consideration, equally conclusive, to the same result. The present provisions of the amendment cannot be practically carried into effect, and there can be no election of councilors by the people, until the legislature shall have divided the commonwealth into eight districts. The terms are explicit: 'The legislature, at its first session after this amendment shall have been adopted, shall divide the commonwealth into eight districts.' This action of the legislature is therefore necessarily preliminary to any other step."

And the judges held that, although the amendment was adopted in 1855, the councilors of 1856 should be appointed under the old provisions of the constitution, because, by the terms of the amendment, none could be elected under the new until November, 1856; and when elected their terms of office would not commence until January, 1857. The same was held in relation to the effect of the amendment as to the election of

The State ex rel. Hudd vs. Timme, Secretary of State.

secretary, treasurer, auditor and attorney general; and the judges were clearly of the opinion that the persons holding these offices at the time the amendment was adopted would continue to hold them until their successors were elected under the provisions of the amendment fixing the time for such election; and in regard to the election of sheriffs and other officers the learned judges say:

"The terms of the amendment are, that the legislature shall prescribe, by general law, for the election of sheriffs, registers of probate, commissioners of insolvency, and clerks of the courts, by the people of the several counties, and district attorneys by the people of the several districts, for such term of office as the legislature shall prescribe. It is very manifest that under this amendment no act can be done until the legislature shall, by law regularly passed, in the ordinary course of its operation, provide for the election of these officers by directing the time, place and manner of voting," etc. "We are, therefore of the opinion that until such laws have been passed in the due course of legislative action, and until elections shall have been made pursuant to such laws, and the officers in question have been chosen, returned and commissioned in the mode thus provided, the persons holding these offices under the constitution and laws as they existed when this amendment was adopted and went into operation, will continue to hold their offices upon the same tenure, and on the same terms, as if this amendment had not been adopted."

The effect of the decision of the learned judges was, that the amendments did not repeal the old provisions, and the existing state of things, until the several amendments took practical effect under their own provisions.

A similar decision as to the effect of an amendment of the constitution of a state upon the state of things existing at the time the amendment was adopted, was made by the supreme court of Arkansas in the case of *State v. Scott*, 9 Ark., 270. In this case two of the learned judges delivered elaborate

The State ex rel. Hudd vs. Timme, Secretary of State.

opinions, holding that an amendment which declared that "the qualified voters of each judicial circuit shall elect the circuit judges," must be construed in harmony with other provisions of the constitution. The judges, at the time the amendment was adopted, were appointed for a fixed term by the legislature, and it was held that the judges in office when the amendment was adopted were entitled to hold out their respective terms notwithstanding the amendment. The same construction was given to an amendment of the constitution by the superior court of Missouri. *State v. Ewing*, 17 Mo., 515. See also the case of *People v Gardner*, 59 Barb., 198; affirmed, 45 N. Y., 812.

We think these opinions are quite applicable to the question we have to determine in this case, viz., When does the amendment as to the biennial sessions go into practical effect? Under the amendment it cannot go into effect until an election of members and senators in the odd-numbered districts takes place at the general election in November next, and until the legislature fixes the time when the sessions of the biennial legislature shall be held. Until the election takes place under the amendment in November next, and until the commencement of the term of office of the members so elected, the present state of affairs must continue, and the members heretofore elected are members of the legislature under the old provisions of the constitution, and their compensation must be that prescribed by the constitution before the amendment was adopted. It seems very clear to us that the provisions changing the compensation of the members of the legislature was a part of the general purpose to change from annual to biennial sessions, and was not intended to affect the rights of members elected and acting under the old order of things. The increased compensation was intended to cover the increased service which would be required of the members under the biennial system. The members of the legislature spoken of in the fourth provision clearly mean those members who should

The State ex rel. Hadd vs. Timme, Secretary of State.

be elected under, or who, holding over, should be called upon to serve as such under, the amended constitution, and not those elected and serving under the constitution as it existed at the time of the adoption of the amendment and before it went into practical effect.

What has been said disposes of the questions raised by the relator, and entitles the respondent to an order discharging the rule against him.

But another question affecting the validity of the amendment in question has been much discussed, both in the legislature and in the public press, and, as it seemed very desirable that all questions bearing upon the question of its regular adoption by the people, so as to become a part of the fundamental law of the state, should be passed upon on the hearing of the motion to discharge the order for a *mandamus* in favor of the relator, we have heard the arguments of counsel upon that question also. The question referred to is, Was the amendment properly submitted to the electors for their ratification? It is claimed by the learned attorney general that the amendment was a single amendment, within the meaning of section 1, art. XII of the constitution of this state, and that it was submitted to the electors as a single amendment, and voted upon by them as such. On the part of those who claim that the amendment was not properly submitted to the electors, and that consequently it was never properly ratified by them, it is insisted that the amendment is not a single amendment, but that it constitutes at least four amendments to the constitution, and that, in order to have the same properly ratified by the people, it should have been submitted as four propositions, each to be voted upon separately, and that, not having been so submitted or voted upon, it is not ratified as prescribed by the constitution, and so is not now a part thereof. This question was very fully and ably argued on the part of the state by the learned attorney general, in favor of the proposition that the amendment was a single amendment within the meaning of

The State ex rel. Hudd vs. Timme, Secretary of State.

the section of the constitution referred to, and was properly submitted and voted upon as a single amendment, and so was properly ratified by the voters as an amendment to the constitution. Upon the other side, Col. William F. Vilas, both in the character of *amicus curiæ* and also as representing those who doubt the regularity of the proceedings to adopt the amendment, submitted a clear, candid and forcible argument against its validity, because it was submitted and voted upon as a single amendment.

Section 1 of article XII of the constitution, which prescribes how amendments can be made to the constitution without calling a convention for that purpose, reads as follows: "Any amendment or amendments to this constitution may be proposed in either house of the legislature, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, with the yeas and nays taken thereon, and referred to the legislature to be chosen at the next general election, and shall be published for three months previous to the time of holding such election. And if, in the legislature so next chosen, such proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the legislature to submit such proposed amendment or amendments to the people in such manner and at such time as the legislature shall prescribe, and if the people shall approve and ratify such amendment or amendments by a majority of the electors voting thereon, such amendment or amendments shall become a part of the constitution: provided, that if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately."

There is no question made against the regularity of the proceedings upon the proposed amendment so far as they relate to the manner in which they were agreed to or adopted by the

The State ex rel. Hudd vs. Timme, Secretary of State.

two consecutive legislatures, nor that the amendment was not properly published before the election of the second legislature which agreed to the same, nor to the manner of submitting the same to the people to vote thereon, in any other matter except that it was submitted as one amendment, to be voted on as such. The learned counsel for the state claim that the matter agreed to by the two legislatures and submitted to the people was but a single amendment to the constitution within the meaning of the section of the constitution above quoted. On the other side it is claimed that the matter contains at least four amendments, and that each should have been submitted and voted upon separately. We agree with the learned counsel who made the argument in opposition to the regularity of the submission, that there can be no dispute that the two legislatures which agreed to the proposition proceeded upon the theory that the several propositions amounted to but one amendment of the constitution. They were all included in one resolution adopted by the first legislature, and ratified and agreed to by the second as one, and they declare it to be but one amendment. The votes in the legislatures were all votes taken upon them as a single amendment, and not as several and distinct amendments. We also agree with the learned counsel that no amendment can be made to the constitution without complying with the provisions of section 1, article XII, above quoted, both in the passage of the amendment by the legislatures and in the manner of the submission.

It was said by counsel that there is no authority upon the question in dispute which rises to the dignity of authority. In the case cited from 24 Ala., 100, it is true, the court speaks of certain propositions to amend the constitution so as to change from annual to biennial sessions. In that case six different sections of the constitution were amended by striking out the word "annual" and inserting in its stead the word "biennial;" but in examining that case it will be seen that there were but two questions submitted to the electors to vote upon, and one

The State ex rel. Hudd vs. Timme, Secretary of State.

of them covered the amendments to the six sections relating to biennial sessions. No question was made in that case as to the regularity of the submission in that form. See p. 102. This fact can, however, have but little bearing upon the question under our constitution, as the constitution of Alabama upon the subject of amendments is radically different from ours upon the same subject. See 1 Poor's Const., 44. The constitution of 1819 of that state seems to have been in force in 1854, when the decision in question was made. We must determine, then, what is meant by the provision of said section 1, article XII, which says, that "if more than one amendment be submitted, they shall be submitted in such manner that the people may vote for or against such amendments separately."

This provision can have but two constructions: First, it may be construed as is contended for by the learned counsel who contends that the amendment under controversy was not properly submitted, that every proposition in the shape of an amendment to the constitution, which standing alone changes or abolishes any of its present provisions, or adds any new provision thereto, shall be so drawn that it can be submitted separately, and must be so submitted. Such a construction would, we think, be so narrow as to render it practically impossible to amend the constitution; or, if not practically impossible, it would compel the submission of an amendment which, although having but one object in view, might consist of considerable detail, and each separate provision, though all promotive of the same object and necessary to the perfection and practical usefulness thereof if adopted as a whole, in such form that a defeat of one of its important matters of detail might destroy the usefulness of all the other provisions when adopted. Take the case as presented by the amendment under consideration. The learned counsel admits that the proposition to change from annual to biennial sessions is so intimately connected with the proposition to change the tenure of office of members of the assembly from one year to two years, that the propriety

The State ex rel. Hudd vs. Timme, Secretary of State.

of the two changes taking place, or that neither should take place, is so apparent that to provide otherwise would be absurd. And yet it is insisted that the two changes are two separate amendments within the meaning of the constitutional provision above quoted, and must be submitted separately. If they must be submitted separately, why must they? Certainly they should either both be defeated or both adopted. Why, then, should the people be permitted or compelled to vote upon each separately? Certainly no good could result from a separate submission which is not equally as well and better accomplished by submitting them together as one amendment; and the separate submission might result in the absurdity of the ratification of the one and the rejection of the other. This illustration is, to my mind, almost conclusive that no such intention was entertained either by the framers of the constitution or by the people who adopted it.

We think amendments to the constitution, which the section above quoted requires shall be submitted separately, must be construed to mean amendments which have different objects and purposes in view. In order to constitute more than one amendment, the propositions submitted must relate to more than one subject, and have at least two distinct and separate purposes not dependent upon or connected with each other. Tested by this rule, the propositions submitted to the electors contained but one amendment. It is clear that the whole scope and purpose of the matter submitted to the electors for their ratification was the change from annual to biennial sessions of the legislature. It was so spoken of by the legislative bodies which passed it, as well as by the electors who ratified it. To make that change it was necessary, in order to prevent the election of members of assembly, half of whom would never have any duties to perform, that a change should be made in their tenure of office as well as in the times of their election, and the same may be said as to the change of the tenure of office of the senators. It is true that

The State ex rel. Hudd vs. Timme, Secretary of State.

it would not have been so absurd not to have changed their tenure of office as it would have been in the case of the members of the assembly; but it was just as important in order to preserve the difference in tenure prescribed in the original constitution. The policy of the original constitution was that a state senator should hold his office during two sessions of the legislature, so that that body might never be composed of entirely new members. There was no purpose to change the policy of the original constitution as to the stability of the organization of the senate, by changing to biennial sessions, and so it became highly proper, if not absolutely necessary, as a part of that change, to change the term of office of the senators as well as of the members. The question of compensation was, perhaps, less intimately and necessarily connected with the change to biennial sessions, yet it was clearly connected with it. The duties and service having been somewhat enlarged, it was proper that the compensation should be increased. We do not contend that the legislature, if it had seen fit, might not have adopted these changes as separate amendments, and have submitted them to the people as such; but we think, under the constitution, the legislature has a discretion, within the limits above suggested, of determining what shall be submitted as a single amendment, and they are not compelled to submit as separate amendments the separate propositions necessary to accomplish a single purpose. The learned attorney general has shown, beyond any controversy, that such has been the construction put upon this section authorizing amendments of the constitution, by the legislature, and by the executive and administrative officers of the state, and that such construction has been acquiesced in by the people, and has been approved, at least *sub silentio*, by this court.

The amendment ratified at the general election of 1871, prohibiting the legislature from passing special or private laws in certain cases, and requiring it to provide general laws for the transaction of any business prohibited by such amendment, is

The State ex rel. Hudd vs. Timme, Secretary of State.

certainly as open to the objection that it was not a single amendment but several, and that they should have been submitted separately, as the one now under consideration. Yet that was submitted as a single amendment and adopted as such, and this court, as well as the executive and legislative departments of the state, have never questioned its validity. Its provisions have been commented upon and upheld by this court in the following cases: *Attorney General v. Railroad Cos.*, 35 Wis., 425; *Kimball v. Town of Rosendale*, 42 Wis., 407, 415; *S. P. Boom Co. v. Reilly*, 44 Wis., 295-301. It may be said that in none of these cases was the question now raised argued or considered. We think, judging from the character of the counsel who argued at least one of those cases, and whose interest it was to have defeated the effect of the amendment, it was a pretty strong evidence that they at least were of the opinion that there was no objection to its validity. In our view of the case, that amendment was a single amendment, having for its purpose one thing, viz., the prevention of special legislation in nine different classes of cases; and, as a consequence of such restriction upon legislative action, providing that general laws should be enacted for the purpose of accomplishing the objects which could not be thereafter accomplished by special laws.

No one would contend but that it would have been entirely competent under the constitution for the legislature to have adopted separately and submitted separately each of the nine propositions in that amendment; but that fact has no force as an argument to prove that it could not be submitted as one amendment, if in the discretion of the legislature it saw fit to submit it in that way. The general purpose and object of the amendment was to restrict the power of the legislature in the matter of enacting special and private laws; and in that view of the case it was a single amendment, and could properly be submitted as such under the constitution, or as several amendments, as the legislature should determine. It was shown by

The State ex rel. Hudd vs. Timme, Secretary of State.

the argument of the learned attorney general that all or nearly all of the seven amendments which have been adopted and accepted as properly ratified by the people, upon a submission of the same as single amendments, are subject to the same objection that is taken to the one now under consideration; and if this was not properly submitted and adopted, then most of the others were not. But adopting the construction which we think should be given to the twelfth article of the constitution upon the subject of amendments, they were all properly submitted as single amendments, because each had but one general purpose in view. All the several provisions in each were connected with and intended to carry into effect such general purpose.

The direction in the constitution requiring separate amendments to be submitted separately has no efficacy in determining what constitutes an amendment as distinguished from what constitutes two or more amendments; and as the word "amendment" is clearly susceptible of a construction which would make it cover several propositions, all tending to effect and carry out one general object or purpose, and all connected with one subject, as well as of the construction that every proposition which effects a change in the constitution, or adds to or takes from it, is an amendment, the construction which has been uniformly adopted by all the departments of the government for a series of years is entitled to great weight in settling by judicial decision what construction should be placed upon it.

The weight which should be given to such a uniform construction of a statutory or constitutional provision has been several times considered by this court, as will be found in the cases cited by the learned attorney general.

In the case of *State v. French*, 2 Pin., 180, the question under consideration was, whether a judge of probate was a judge within the meaning of the provision of the constitution prohibiting the election of judges within twenty days of a general election. Chief Justice Srow, in delivering the opinion in

The State ex rel. Hudd vs. Timme, Secretary of State.

that case, after submitting a very able argument showing that they were not judges within the meaning of the word as used in the constitution, adds: "But did the matter admit of a doubt in the first instance, that doubt should be regarded as removed by the action which has been had under this act. While this court will never allow its judgments to be influenced by popular opinion, the united understanding and action of the whole state in a matter of great public interest is a guide that any tribunal may safely follow."

In *Harrington v. Smith*, 28 Wis., 43, Chief Justice Dixon says: "The statute was enacted, and has been continuously interpreted, understood and acted upon by the executive department of the government, the officers appointed by law to carry its provisions into effect, as requiring the issue of certificates upon sales, for a period of twenty-one years and during twelve successive administrations of the state. Long and uninterrupted practice under a statute, especially by the officers whose duty it was to execute it, is good evidence of its construction; and such practical construction will be adhered to even though, were it *res integra*, it might be difficult to maintain it." The following cases, cited by the learned chief justice as sustaining the rule laid down by him, are all in confirmation of the rule stated: *McKeen v. Delancy*, 5 Cranch, 22; *Edwards' Lessee v. Darby*, 12 Wheat., 210; *Rogers v. Goodwin*, 2 Mass., 475; *Packard v. Richardson*, 17 Mass., 144; *Opinion of Justices*, 3 Pick., 517; *U. S. v. Gilmore*, 8 Wall., 330; *Union Ins. Co. v. Hoge*, 21 How. (U. S.), 36, 66; *Havemeyer v. Iowa County*, 3 Wall., 291.

In *Edwards' Lessee v. Darby* the court says: "In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who are called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect."

In *Packard v. Richardson* the court uses the following language: "A contemporaneous is generally the best construc-

The State ex rel. Hudd vs. Timme, Secretary of State.

tion of a statute. It gives the sense of a community of the terms used by the legislature. If there is an ambiguity in the language, the understanding and application of it when the statute first comes into operation, sanctioned by long acquiescence on the part of the legislature and judicial tribunals, is the strongest evidence that it has been rightly explained in practice. A construction under such circumstances becomes established law."

In the *Opinion of Justices* it is said: "Contemporaneous expositions of doubtful provisions in all instruments, and particularly in legislative enactments and constitutional charters, are held to be legitimate and useful sources of construction." "What has been done in the beginning and has continued to be done for a long series of years, without any question as to the rightful power or authority on which such acts have been grounded, may be presumed by succeeding public agents to have been rightly and properly done, in case no private right or public immunity is invaded."

Authorities upon this question might be multiplied to an almost unlimited extent; but those cited are sufficient to justify us in giving great weight to the practical construction given to the provision of the constitution now under consideration, by the legislative, executive and judicial departments of the state, frequently ratified and approved, without raising any voice of dissent, by the people during a period of over fifteen years, and would compel us to affirm such construction although we might have entertained some serious doubts as to the real meaning thereof. Fortunately, in this case, the court entertains no serious doubt but that the practical construction given to it is the true construction, and the one most likely to accomplish in an orderly manner the amendment of the constitution under the provisions of section 1, art. XII.

By the Court.—The motion to quash the alternative writ of *mandamus* is granted.

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

BROWN and wife vs. THE CHICAGO, MILWAUKEE & ST. PAUL
RAILWAY COMPANY.

November 30, 1881 — March 14, 1882.

TORTS: PLEADING: DAMAGES. (1) *Complaint held to go for a tort, and not for a breach of contract.* (2, 3) *Rule of damages: Unforeseen consequences.* (4) *Direct or proximate consequences.*

REVERSAL OF JUDGMENT: (5) *On weight of evidence.*

1. The complaint seeks a recovery for sickness and bodily and mental suffering of the plaintiff wife, and for mental suffering and expense and trouble on the part of the plaintiff husband growing out of the sickness of the wife, alleged to have been caused by the negligence of defendant's servants in directing plaintiffs to leave a train of passenger cars before they had reached their destination; and the action is held to be *in tort*, for the negligence, and not upon the contract of carriage, notwithstanding averments which show a contract relation between the parties, and that defendant "wholly disregarded its duty in the premises and its contract and obligations to and with the plaintiffs."
2. While the rule in actions for breach of contract is, that the damages recoverable are only such as the parties may reasonably be supposed to have contemplated as likely to result from such a breach, the general rule in actions for torts is, that the wrong-doer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him.
3. The fact, therefore, that defendant's servants did not know the delicate state of health of the plaintiff wife at the time of the alleged wrong, does not relieve defendant from liability for the actual, direct consequences of such wrong.
4. The direct or proximate consequences of a wrongful act are those which occur without any intervening *independent* cause; and the fact that the injuries chiefly complained of were caused *immediately* by the act of plaintiffs in walking from the place where they left the cars to the next station, will not relieve defendant from liability therefor, where it appears that plaintiffs' act in so walking was rendered apparently necessary by defendant's wrongful act, and was not negligent.
5. The evidence in this case of subsequent negligence on plaintiffs' part, contributing to the injury, is not sufficient to warrant this court in reversing a judgment upon verdict in their favor.

COLE, C. J., and LYON, J., dissent.

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

APPEAL from the Circuit Court for *Juneau* County.

The pleadings are thus stated by Mr. Justice TAYLOR:

"The cause of action in this case will be best stated by giving a copy of the complaint, which sets forth fully the facts upon which a recovery is sought. After stating the incorporation of the defendant, and alleging that it was a common carrier of passengers in this state, the complaint proceeds as follows: 'That said plaintiffs, on or about the 2d day of October, 1879, desired to go to Mauston, aforesaid, from the said village of Kilbourn City, and for that purpose bought and paid about \$2.30 for tickets at Kilbourn City, from the agent of said defendant, to convey said plaintiffs to Mauston and return to Kilbourn City, whereby it became the duty of said defendant, as carrier of passengers, to carry the said plaintiffs from Kilbourn City to Mauston in their passenger train which left Kilbourn City to go to Mauston at about 6:20 P. M. of said day, and to treat said plaintiffs in a respectful manner, and carry them to the proper and usual landing place at Mauston, to wit, the depot of said defendant at said place. That the said defendant wholly disregarded its said duty in the premises, and its contract and obligations to and with said plaintiffs, and, when about three miles east of the depot of the defendant at the said village of Mauston, informed said plaintiffs, by its proper agents and servants, that they had arrived at Mauston, aforesaid, and stopped the train for them to get off. That said plaintiffs, supposing and believing they had arrived at Mauston, as they were informed they had by the defendant's servants, as aforesaid, alighted from the defendant's train, and the train passed on. That after said train had left them, they perceived that they were not at the Mauston depot, and did not know where they were. That it was quite dark. That they supposed and believed that they were near the Mauston depot, and proceeded up the track in the direction of Mauston, as they supposed, expecting in a few moments to arrive at the Mauston depot. That, instead of being near

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

the Mauston depot, they found afterwards they were not, but, on the contrary, had been carelessly and negligently put off the defendant's train by its servants about three miles east of said depot, apparently in the country; and the plaintiffs knew not otherwise, but supposed and believed that they had got to walk west on the track of the defendant until they came to some station. That, after walking on the track of the defendant about three miles, they came to the said village of Mauston; the said plaintiff, *Mary A. Brown*, being, by reason of said long walk, very tired and exhausted, sick and prostrated, passing the balance of the night in a very restless, uneasy and feverish condition. That previous to the said 2d day of October, 1879, and to leaving Kilbourn City as aforesaid, the said plaintiff *Mary A. Brown* had been a healthy, well and robust person, and at the time of taking said walk was pregnant with child. That, in consequence of being carelessly and negligently put off the cars of the defendant, as aforesaid, and of her said walk, she became sick, ailing and very much enfeebled, and continued getting worse, although using the best of care and medical attendance, until about December 20, 1879, when she lost her child. That for a long time the said plaintiff *Mary A. Brown* was seriously and dangerously ill, so much so that her life was greatly endangered and despaired of, and she had suffered and continued to suffer great pain in body and mind; and that the said plaintiff *Orange Brown*, her husband, suffered personally great anxiety of mind, and was put to great expense and trouble in care, nursing, help and medical attendance and medicines.' The defendant's answer was a general denial only."

Instructions asked by the defendant to the effect that injuries to the wife from her exposure could not be considered in estimating damages, and that, if plaintiffs voluntarily undertook to journey from the point where they were put off to Mauston, no damages could be given for the sickness of the wife and the injury to her, were severally refused. The court

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

instructed the jury, among other things, that if plaintiffs, before leaving the place at which they got off from the train, "took no steps to find out whether there was a depot building, or any accommodations for them there, but willingly undertook to walk, then no damages could be given for the injuries to *Mrs. Brown*;" and that if, before leaving that vicinity, they knew, or, in the exercise of ordinary caution and prudence, ought to have ascertained, where they were, and, rather than suffer the inconvenience of waiting for another train, undertook to walk to the end of their journey, then defendant was liable only for damages caused by the delay and for the fare paid for the remainder of the journey.

Plaintiffs had a verdict for \$2,500; a new trial was refused, and defendant appealed from a judgment entered pursuant to the verdict.

D. S. Wegg, for appellant:

The action is for a breach of contract. The complaint sets forth the contract of transportation, and alleges that through the contract the duty of safe transportation was thrown upon the defendant, and that such duty was disregarded. *Orange Bank v. Brown*, 3 Wend., 158; *Wood v. M. & St. P. Railway Co.*, 32 Wis., 398; *Walsh v. C., M. & St. P. Railway Co.*, 42 id., 23. Applying the most liberal rules in favor of treating the allegations in reference to duty as intending a duty cast upon the defendant by the ordinary principles of law, and not one connected with the contract of transportation, it would be a complaint containing language which set out both the custom of the realm and the contract, and would be one *ex delicto quasi ex contractu*. In such case the action is in reality founded upon the contract, and is to be so regarded. *Orange Bank v. Brown*, *supra*. The damages claimed for the injuries to *Mrs. Brown* cannot, therefore, be recovered here, for they are not such as may fairly be taken to have been contemplated by the parties as the possible result of the breach

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

of the contract. *Hobbs v. L. & S. W. Railway Co.*, L. R., 10 Q. B., 111; *Walsh v. Railway Co.*, *supra*; *Le Blanche v. L. & N. W. Railway Co.*, L. R., 1 Com. Pl. Div., 286; *S. C.*, 24 Weekly Rep., 396, 808; *I., B. & W. Railway Co. v. Birney*, 71 Ill., 391; *Pullman Palace Car Co. v. Barker*, 4 Col., 344; *Frances v. St. Louis Transfer Co.*, 5 Mo. App., 7; *Vedder v. Hildreth*, 2 Wis., 427; *Brayton v. Chase*, 3 id., 456; *Bradley v. Denton*, id., 557; *Servatius v. Pickel*, 34 id., 299; *Candee v. W. U. Tel. Co.*, id., 471; *Oleson v. Brown*, 41 id., 415; *Ingram v. Rankin*, 47 id., 409; *Giese v. Schultz*, 53 id., 462. But if the action should be considered as one in tort, the same rule as to remoteness of damages would apply. The damages, to be recoverable, must be the natural and proximate consequence of the wrongful act — such as in the ordinary course of things would flow from defendant's conduct. Wood's *Mayne on Damages*, sec. 52; *Sedgwick on Damages*, 57 et seq.; *Shearm. & Redf. on Negligence*, sec. 595; *Phillips v. Dickerson*, 85 Ill., 11; *Moak's Underhill on Torts*, 16; *Addison on Torts*, 6; *Cooley on Torts*, 68; *Sharp v. Powell*, L. R., 7 C. P. Cases, 253; *Williamson v. Grand Trunk Railway Co.*, 17 U. C. C. P., 615; *Allsop v. Allsop*, 5 H. & N., 534; *Lynch v. Knight*, 9 H. L. C., 577; *Waller v. Midland Railway Co.*, L. R., 4 Ireland, 376; *Glover v. L. & S. W. Railway Co.*, L. R., 3 Q. B., 25. 2. Counsel further contended that the plaintiffs were guilty of negligence on the night in question, and that their subsequent neglect to call a physician would prevent the recovery of damages for the abortion, citing *Hassa v. Junger*, 15 Wis., 598; *Eastman v. Sanborn*, 3 Allen, 594; *Stover v. Bluehill*, 51 Me., 439; *Illinois Central R. R. Co. v. McClelland*, 42 Ill., 355.

J. W. Lusk, for the respondent, cited *Thompson on Carriers of Passengers*, 566; *Patten v. C. & N. W. Railway Co.*, 32 Wis., 524; *McMahon v. Field*, Ch. Div., 44 L. T., 175; 23 Alb. L. J., 345; *Williams v. Vanderbilt*, 28 N. Y., 217; *Ward*

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

v. Vanderbilt, 34 How. Pr., 144; *Oliver v. La Valle*, 36 Wis., 592; *Shepard v. Milwaukee Gas Light Co.*, 15 id., 329; *Stewart v. City of Ripon*, 38 id., 591. .

The following opinion was filed January 10, 1882:

TAYLOR, J. Upon this appeal the learned counsel for the railway company insisted that the damages claimed for the sickness of the wife, and for her medical attendance and care, are too remote to constitute a cause of action, and that it was error on the part of the court below not to take that part of the case from the jury.

The first position taken by the learned counsel for the appellant is, that the cause of action set out in the plaintiffs' complaint is for a breach of contract, and not an action in tort. Upon this point we cannot agree with the appellant. We think the gravamen of the action is the negligence and carelessness of the appellant's agents and employees in directing the plaintiffs to leave the train before they had arrived at the end of their journey. They did not leave at a place short of their destination knowing that fact, but through the neglect of the appellant's employees they were induced to leave the train short of their journey's end, supposing that they had reached it. It is true, the plaintiffs in their complaint state that they paid their fare and went on board the train as passengers, to be carried from one point to another on the appellant's road, and that by reason of such payment and entry upon that train it became the duty of the appellant to carry them from the point of starting to their destination. These facts are, perhaps, sufficient to constitute a contract on the part of the appellant to safely carry them to their destination. Still, it is necessary in all actions against a carrier of passengers to state facts which show the right of the party to be carried, before he can complain of any breach of duty on the part of the carrier in not conveying them safely, or in not carrying them to their destination. The complaint in this case is not so much that the

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

plaintiffs were not carried to their destination, but that on the way the appellant's employees carelessly and negligently induced them to quit the train before they arrived at their destination, and that in consequence of such wrong on the part of the appellants they suffered damage. It is the negligence in putting the plaintiffs off the train before the journey was completed, which is complained of, and not a breach of the contract in not carrying them to the end of their journey.

We see no reason for distinguishing this case from the class of cases which hold a railway company liable in tort for an injury done to a passenger, while traveling on a train, caused by collision, the breaking down of a bridge, or any defect in the road or cars. All these matters are a breach of the contract to carry the passenger safely; yet the carrier is held liable in an action of tort, for any injury sustained, based upon the allegation that it was incurred through the carelessness and negligence of the company. All the cases hold that the person injured through the negligence or carelessness of the carrier may proceed either upon contract, alleging the careless or negligent acts of the defendant as a breach of the contract, or he may proceed in tort, making the carelessness and negligence of the company the ground of his right of recovery; and if he proceed for the tort, it becomes necessary on the part of the plaintiff to show that he stands in the relation of a passenger of the carrier, in order to show his right to recover damages for the negligence of the carrier in not discharging his duty in carrying him safely. Where the relation of passenger and carrier exists, the law fixes the duty of the carrier towards the passenger, and any violation of that duty is a wrong; and if injury occurs to the passenger from such wrong, the carrier is responsible and must make good the damage resulting therefrom. *Wood v. Railway Co.*, 32 Wis., 398; *Walsh v. Railway Co.*, 42 Wis., 23; *Craker v. Railway Co.*, 36 Wis., 657-675, and cases cited. In this case we deem it material to determine whether the action is an action for

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

a tort, or an action for a breach of the contract to carry the plaintiffs to their destination, because we think the rules of damages in the two actions are essentially different. We hold that the action in this case is based upon the tort of the defendant in negligently and carelessly directing the plaintiffs to leave the cars before they reached their destination.

The plaintiffs claim, and the evidence shows, that they and their child, about seven years old, were directed to leave the cars, by the brakeman, at a place some three miles east of Mauston, being told at the time that it was Mauston, their place of destination. When they left the cars it was night; it was cloudy, and had rained the day before; there was a freight train standing on a side track where they were put off the train; there was no platform, and no lights visible except those on the freight train. Plaintiffs soon ascertained that they were not at Mauston, and did not know where they were. They did not see the station-house, although there was one, but it was hid from their view by the freight train standing on the side track. They supposed they were at a place two miles east, where the train sometimes stopped, but where there was no station-house. They started west on the track towards Mauston, expecting to find a house where they might stop, but did not find one until they came to the bridge, about a mile east of Mauston, and then they thought it easier to go on to Mauston than seek shelter at the house, which was a considerable distance from the track. They went on to Mauston, and arrived there late at night, *Mrs. Brown* quite exhausted from the walk. She was pregnant at the time. She had severe pains during the night, and the pains continued from time to time, and after a few days she commenced flowing. The pains and flowing continued until some time in December, when a miscarriage took place, after which inflammation set in, and for some time she was so sick that she was in imminent danger of dying. The plaintiffs claim that the miscarriage and subsequent sickness were all caused by the

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

walk *Mrs. Brown* was compelled to take to get from the place where they were left by the train to Mauston.

The important question in the case is, whether the appellant is liable for the injury to *Mrs. Brown*, admitting that it was caused by her walk to Mauston. Whether the sickness of *Mrs. Brown* was caused by the walk to Mauston was an issue in the case, and the jury have found upon the evidence that it was caused by the walk. There is certainly some evidence to sustain this finding of the jury, and their finding is therefore conclusive upon this point. Admitting that the walk caused the miscarriage and sickness of the plaintiff *Mrs. Brown*, it is insisted by the learned counsel for the appellant, that the appellant is not liable for such injury; that it is too remote to be the subject of an action; that the negligence and carelessness of the defendant's employees in putting the plaintiffs off the cars at the place they did, was not the proximate cause of the miscarriage and sickness, and for that reason the appellant company is not liable therefor.

To sustain this position of the learned counsel for the appellant, reliance is placed upon the case of *Walsh v. Railway Co.*, 42 Wis., 23, and it is insisted that there can be no real distinction made between that case and this. Upon a careful examination of that case, it will be seen, we think, that the court did distinguish between an action which was purely an action for a breach of contract, and one in tort. In that case the learned circuit judge charged the jury as follows: "If you find that the failure to return to Madison on the day in question, at the time agreed upon in the contract, was caused directly by orders from the headquarters and principal manager of the railway company, made with the full knowledge that the plaintiff and the other excursionists were ready and waiting to be carried home according to the arrangement made therefor, and made in willful disregard of the rights of the plaintiff and the other excursionists, subordinating their rights to the convenience of the company, when they had the means

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

at hand readily to have fulfilled their duty — in short, that the conduct of the company was willful and oppressive,— then you may give full compensatory, though not punitive, damages, embracing such loss of time, such injury to health, such annoyance and vexation of mind, and such mental distress and sense of wrong, as you find was the immediate result of the misconduct, and must necessarily and reasonably have been expected to arise therefrom to the plaintiffs as one of the excursionists.” This instruction was excepted to, and this court held the instruction erroneous, and reversed the judgment for that cause.

The present chief justice, who wrote the opinion in the case, takes special pains to show that the action was based solely upon a breach of contract, and was in no sense an action of tort, and he expressly declares that the rule of damages is not the same where the action is for a breach of contract as for a tort. Upon this point he uses the following language: “It will be seen that the circuit court was requested to charge that the plaintiff was only entitled to recover such damages as naturally and fairly resulted from the breach of contract, but could not recover damages for the disappointment of mind, sense of wrong, or injury to his feelings by reason of such breach. This rule the learned circuit judge disaffirmed, holding that if the conduct of the company *was willful and oppressive*, then such injury to health, annoyance and vexation of mind, mental distress and sense of wrong, as were the immediate result of the misconduct and must reasonably have been expected to arise therefrom to the plaintiff, were proper matters to be considered in giving compensatory damages. *This was confounding the important distinction, so far as the rule of damages is concerned, between an action in tort and one upon contract.* It was in fact applying to this case the rule which was laid down in *Craker v. Railway Co.*, 36 Wis., 657, in an action for a tort committed by an agent of the company. In the case of wrongs, the jury are permitted

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

to consider injury to feelings and many other matters which have no place in questions of damages for a breach of contract."

The chief justice then quotes at large from the case of *Hobbs v. Railway Co.*, 10 Law Rep. (Q. B.), 111, with approval. In that case the English court of appeals held, that when the railway company had neglected or refused to carry the plaintiffs to their destination, and they were compelled to get out at a station about five miles from it, late at night, and, being unable to get a conveyance or accommodation at an inn, they walked home a distance of five miles in the rain, and the wife caught cold and was sick as a consequence of the walk and exposure, they could not recover for the injury to the wife. It would seem, from the opinions given by the learned judges in the *Hobbs Case*, that they treated the action as an action upon contract, and not an action for a tort. All the judges speak of it as an action to recover for the breach of the contract to carry the plaintiffs to their destination.

The rule as to what damages may be recovered in actions for breach of contract, is laid down by this court in the case of *Candee v. W. U. Tel. Co.*, 34 Wis., 479, cited from *Hadley v. Baxendale*, 9 Exch., 341, and approved. It is as follows: "Where two parties have made a contract, which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be either such as may fairly and substantially be considered as arising naturally — that is, according to the usual course of things — from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."

The latter part of this rule, as above quoted, would seem to cover all cases of breach of contract; for it must be presumed that the parties would reasonably be supposed to have contemplated that the party injured by the breach of the contract

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

would sustain such damages as would fairly and substantially, in the usual course of things, result from such breach. And so it is often said that, in an action for a breach of contract, the damages to be recovered are such as may reasonably be supposed to have been in the contemplation of both parties when they made it. Under this rule, the damages which may be recovered in an action for the breach of a contract are sometimes more remote and far-reaching than those recoverable for a tort.

The case of *Richardson v. Chynoweth*, 26 Wis., 656, is an illustration of the rule. In that case the court say: "In such cases, where the contracting party is advised of the special purpose of the thing to be completed, and of the damage that would naturally accrue from failure to complete it at the specified time, and in view of this expressly stipulates to finish it at a given time, there is no reason why he should not be responsible for such damage as is the direct, natural result of his failure, even though beyond the mere difference between the contract and market price." See *Shepard v. Milwaukee Gas Light Co.*, 15 Wis., 318; *Flick v. Weatherbee*, 20 Wis., 392.

In many cases of breach of contract, the courts have by their decisions established a rule of damages which is applicable to all of a class. In an action for a breach of contract to pay money at a fixed time, the damages are the lawful interest on the money withheld, from the time it was payable to the date of the judgment, unless the contract expressly stipulates for other damages. So, in actions for a breach of a covenant of warranty of title, the damages are limited, ordinarily, to the purchase money paid and interest. In these and other classes of cases, the damages are fixed by arbitrary rules; but still the general rule above stated, that the damages are such as "it may reasonably be supposed to have been contemplated that the party injured by the breach of the contract would sustain," would apply to such cases; for, in contracts of the

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

classes above mentioned, the parties would enter into them knowing the law fixing the damages for the breach, and so they would be supposed to have contemplated the payment of such damages in a case of breach and no other.

In the case of *Hobbs v. Railway Co.*, *supra*, the learned justices state the rule in case of breach of contract in more concise language. They say: "Such damages are recoverable as a man when making the contract would contemplate would flow from a breach of it." Under this rule it was *held* in the *Hobbs Case*, and by this court in the *Walsh Case*, that in an action for a breach of contract in failing to carry a passenger to his destination, damages could not be recovered for injury to the health, annoyance and vexation of mind and mental distress, on the ground that such damages were not such as the parties making the contract would contemplate as likely to result from its breach.

We are not disposed now to question the correctness of the decision made by this court in the case of *Walsh v. Railway Co.*, *supra*, limited as that case was to an action solely for a breach of contract. In such cases the willfulness of the party in refusing to fulfill the contract does not in any way change the rule of damages. The rule as to the damages in actions upon contract is the same whether the breach be by mistake, pure accident, or inability to perform it, or whether it be willful and malicious. The motives of the party breaking the contract are not to be inquired into. 1 Sedgw. Meas. Dam., 439 et seq., and cases cited.

The rules which limit the damages in actions of tort, so far as any general rules can be established, are in many respects different from those in actions on contract. The general rule is, that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting from such act, although such resulting injury could not have been contemplated as a probable result of the act done. 1 Sedgw. Meas. Dam., 130, note; *Eten v. Luyster*, 60 N. Y., 252; *Hill v.*

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

Winsor, 118 Mass., 251; *Lane v. Atlantic Works*, 111 Mass., 136; *Keenan v. Cavanaugh*, 44 Vt., 268; *Little v. Railroad Corp.*, 66 Me., 239; *Collard v. Railway Co.*, 7 H. & N., 79; *Hart v. Railroad Co.*, 13 Met., 99, 104; *Wellington v. Downer Kerosene Oil Co.*, 104 Mass., 64; *Metallic Compression Casting Co. v. Railroad Co.*, 109 Mass., 277; *Salisbury v. Herchenroder*, 106 Mass., 458; *Perley v. Railroad Co.*, 98 Mass., 414; *Kellogg v. Railway Co.*, 26 Wis., 223; *Patten v. Railway Co.*, 32 Wis., 524, and 36 Wis., 413; *Williams v. Vanderbilt*, 28 N. Y., 217; *Ward v. Vanderbilt*, 34 How. Pr., 144; *Bowas v. Pioneer Tow Line*, 2 Sawy. (U. S. C. C.), 21. These cases, and many more which might be cited, clearly establish the doctrine that one who commits a trespass or other wrong is liable for all the damage which legitimately flows directly from such trespass or wrong, whether such damages might have been foreseen by the wrong-doer or not.

As stated by Justice COLT in the case of *Hill v. Winsor*, 118 Mass., 251: "It cannot be said, as a matter of law, that the jury might not properly find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence, and it is not necessary that the injury, in the precise form in which it in fact resulted, should have been foreseen. It is enough *that it now appears to have been* a natural and probable consequence."

In the case of *Bowas v. Pioneer Tow Line*, *supra*, Judge HOFFMAN, speaking of the rule in relation to damages on a breach of contract, as contrasted with the rule in case of wrongs, says: "The effect of this rule is more often to limit than to extend the liability for a breach of contract, although sometimes, when the special circumstances under which the contract was made have been communicated, damages consequential upon a breach made under those circumstances will be deemed to have been contemplated by the parties, and may be recovered by the defendant. But this rule, as Mr. Sedg-

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

wick remarks, has no application to torts. He who commits a trespass must be held to contemplate all the damage which may legitimately flow from his illegal act, whether he may have foreseen them or not; and so far as it is plainly traceable, he must make compensation for it."

The justice and propriety of this rule are manifest, when applied to cases of direct injury to the person. If one man strike another, with a weapon or with his hand, he is clearly liable for all the direct injury the party struck sustains therefrom. The fact that the result of the blow is unexpected and unusual, can make no difference. If the wrong-doer should in fact intend but slight injury, and deal a blow which in ninety-nine cases in a hundred would result in a trifling injury, and yet by accident produce a very grave one to the person receiving it, owing either to the state of health or other accidental circumstances of the party, such fact would not relieve the wrong-doer from the consequences of his act. The real question in these cases is, Did the wrongful act produce the injury complained of? and not whether the party committing the act could have anticipated the result. The fact that the act of the party giving the blow is unlawful, renders him liable for all its direct evil consequences.

This was the substance of the decision in the old and often cited squib case of *Scott v. Shepherd*, 2 W. Bl., 892. Justice NARES there says that, "the act of throwing the squib being unlawful, the defendant was liable to answer for the consequences, be the injury mediate or immediate;" and in this view of the case all the judges agreed, although they differed upon the question as to the form of the action.

In the case at bar, the question to be determined is, whether the negligent act of the defendant's employees in putting the plaintiffs and their child off the train in the night-time, at the place where they did, was the direct cause of the injury complained of by the plaintiffs, or whether it was only a remote cause for which no action lies. We must, in considering this

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

case, take it for granted that the walk from the place where they left the cars to Manston was the immediate cause of the injury complained of. We think the question whether there was any negligence on the part of the plaintiffs in taking the walk, was properly left to the jury, as a question of fact; and they found that they were guilty of no negligence on their part. They found themselves placed by the wrongful act of the defendant where it became necessary for their protection to make the journey. The fact that there was a station-house near by, at which they might have found shelter until another train came by, is not conclusive that the plaintiffs were negligent in the matter. They were landed at a place where they could not see it, and the jury have found that under the circumstances they were not guilty of negligence in not finding it. The defendant must therefore be held to have caused the plaintiffs to make the journey as the most prudent thing for them to do under the circumstances. And, we think, under the rules of law, the defendant must be liable for the direct consequences of the journey. Had the defendant wrongfully placed the plaintiffs off the train in the open country, where there was no shelter, in a cold and stormy night, and, on account of the state of health of the parties, in their attempts to find shelter they had become exhausted and perished, it would seem quite clear that the defendant ought to be liable. The wrongful act of the defendant would be the natural and direct cause of their deaths, and it would seem to be a lame excuse for the defendant, that, if the plaintiffs had been of more robust health, they would not have perished or have suffered any material injury.

The defendant is not excused because it did not know the state of health of *Mrs. Brown*, and is equally responsible for the consequences of the walk as though its employees had full knowledge of that fact. This court expressly so held in the case of *Stewart v. Ripon*, 38 Wis., 591, and substantially in the case of *Oliver v. Town of La Valle*, 36 Wis., 592.

Upon the findings of the jury in this case, it appears that

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

the defendant was guilty of a wrong in putting the plaintiffs off the cars at the place they did; that in order to protect themselves from the effects of such wrong they made the walk to Mauston; that in making such walk they were guilty of no negligence, but were compelled to make it on account of the defendant's wrongful act; and that, on account of the peculiar state of health of *Mrs. Brown* at the time, she was injured by such walk. There was no intervening independent cause of the injury, other than the act of the defendant. All the acts done by the plaintiffs, and from which the injury flowed, were rightful on their part, and compelled by the act of the defendant. We think, therefore, it must be held that the injury to *Mrs. Brown* was the direct result of the defendant's negligence, and that such negligence was the proximate and not the remote cause of the injury, within the decisions above quoted. We can see no reason why the defendant is not equally liable for an injury sustained by a person who is placed in a dangerous position, whether the injury is the immediate result of a wrongful act, or results from the act of the party in endeavoring to escape from the immediate danger.

When by the negligence of another a person is threatened with danger, and he attempts to escape such threatened danger by an act not culpable in itself under the circumstances, the person guilty of the negligence is liable for the injury received in such attempt to escape, even though no injury would have been sustained had there been no attempt to escape the threatened danger. This was so held, and we think properly, in the case of a passenger riding upon a stage coach, who, supposing the coach would be overturned, jumped therefrom and was injured, although the coach did not overturn, and would not have done so had the passenger remained in his seat. The passenger acted upon appearances, and, not having acted negligently, it was held that he could recover; it being shown that the coach was driven negligently at the time, which negligence produced the appearance of danger. *Jones v. Boyce*,

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

1 Stark., 493. The ground of the decision is very aptly and briefly stated by Lord ELLENBOROUGH in the case as follows: "If I place a man in such a situation that he must adopt a perilous alternative, I am responsible for the consequences."

So, in the case at bar, the defendant, by its negligence, placed the plaintiffs in a position where it was necessary for them to act to avoid the consequences of the wrongful act of the defendant, and, acting with ordinary prudence and care to get themselves out of the difficulty in which they had been placed, they sustained injury. Such injury can be, and is, traced directly to the defendant's negligence as its cause; and it is its proximate cause, within the rules of law upon that subject. The true meaning of the maxim, *causa proxima non remota spectatur*, is probably as well defined by the late Chief Justice DIXON in the case of *Kellogg v. Railway Co.*, *supra*, as by any other judge or court. He states it as follows: "An efficient, adequate cause being found, must be considered the true cause, unless some other cause not incident to it, but independent of it, is shown to have intervened between it and the result."

In the case of *M. & St. P. Railway Co. v. Kellogg*, 94 U. S., 475, the court say: "We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must therefore always be, whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. . . . In the nature of things there is in every transaction a succession of events, more or less dependent upon those preceding; and it is the province of a jury to look at

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies; and this must be determined in view of the circumstances existing at the time."

Within this definition, the negligence of the defendant was the proximate cause of the injury to *Mrs. Brown*, as there was no other cause, not incident to such negligence, which intervened to cause the same.

There is, I think, but one case cited by the learned counsel for the appellant which appears to be in direct conflict with this view of the case, except those which relate to breaches of contract, and that is the *Pullman Palace Car Co. v. Barker*, 4 Col., 344. This case is, we think, unsustained by authority, and is in direct conflict with the decisions of this court in the cases of *Stewart v. Ripon* and *Oliver v. Town of La Valle*, *supra*. This decision is, it seems to me, supported by the principles of neither law nor humanity. It in effect says that, if an individual unlawfully compels a sick and enfeebled person to expose himself to the cold and storm to escape worse consequences from his wrongful act, he cannot recover damages from the wrong-doer, because it was his sick and enfeebled condition which rendered his exposure injurious. Certainly such a doctrine does not commend itself to those kinder feelings which are common to humanity, and I know of no other case which sustains its conclusions.

In the case of *Sharp v. Powell*, Law Rep., 7 Com. P., 253, the defendant was not held liable in an action of tort under the following circumstances: He unlawfully washed a van in the street, and the water ran down the gutter towards a grating leading to the sewer. In consequence of the extreme cold weather, the grating was obstructed with ice, so that the water could not escape, and so spread out and froze over the causeway, which was badly paved and rough, and there froze. The plaintiff's horse, while being led past the spot, slipped upon

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

the ice and was lamed. The action was brought to recover for the injury to the horse, and, because it was shown that the defendant did not know that the grate was stopped so that the water could not escape, he was held not liable. This case comes within the rule above stated; there was an intervening and independent agency which caused the forming of the ice in the street, and the consequent injury, viz., the frozen condition of the grate, of which he was ignorant, and for which he was in no way responsible.

The cases of *I., B. & W. Railway Co. v. Birney*, 71 Ill., 391, and *Francis v. St. Louis Transfer Co.*, 5 Mo. App., 7, were both cases similar to the one at bar; but both cases were decided in favor of the defendants, because it was held by the court that the plaintiffs, after being wrongfully left by the defendants short of their journey's end, were guilty of gross negligence in their manner of attempting to complete the journey, and so were not entitled to recover. I should say, from the reasoning of the judges in both these cases, that the judgment would have been for the plaintiffs had there been no fault on their part, and had an injury occurred to them in prosecuting the journey not arising from their fault or the fault of a third person.

In the case of *Phillips v. Dickerson*, 85 Ill., 11, the defendant was doing no wrong to the plaintiff, and, so far as the case shows, was unconscious of her existence at the time. It was an exceptional case.

It would extend this opinion to too great length to undertake any review of the almost infinite number of cases in which the question of remote or proximate causes is discussed. No general and fixed rule can be laid down to govern all cases. It is said by the supreme court of the United States in *M. & St. P. Railway Co. v. Kellogg*, *supra*: "The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or legal knowledge. It is to be determined as a fact, in view of the

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

circumstances of fact attending it." And similar language was used by this court in the case of *Patten v. Railway Co.*, 32 Wis., 524-535. In that case the present chief justice says: "At all events, we think the question was properly submitted to the jury to determine, whether under all the circumstances the failure of the company to have a light at the depot on the arrival of the train was the direct and proximate cause of the accident."

We think that all the objections made by the learned counsel for the appellant to the right of the plaintiffs to recover for the injury to the health of *Mrs. Brown* were overruled by this court in the cases of *Oliver v. Town of La Valle* and *Stewart v. Ripon*. In the *Oliver Case*, the injury complained of was like that in the case at bar. The only difference in the two cases is, that in the *Oliver Case* the evidence connecting the injury with the negligence of the defendant was more satisfactory than in the case at bar. But the question of the conclusiveness of the evidence is one for the jury, and they have settled that question in favor of the plaintiffs. In the *Oliver Case*, the negligence of the town caused the defendant's horses to fall through and get entangled in a bridge in the highway, which rendered it necessary that the plaintiff should make exertions to free the horses from their difficulty, and such exertions caused the injury complained of. It is the same in the case at bar, only not as plain in its circumstances. The negligence of the defendant put the plaintiffs in a situation which rendered it necessary for them to make an exertion to get out of such difficulty, and in doing so the plaintiff *Mrs. Brown* was injured, the same as *Mrs. Oliver* in the other case.

The case of *Stewart v. Ripon* settles the other question, that the peculiar condition of *Mrs. Brown* at the time is no defense to her claim for damages.

The objection made that the verdict should be set aside because the evidence shows a want of care on the part of the

Brown and wife vs. The Chicago, Milwaukee & St. Paul R'y Co.

defendants, and that the injury resulted from such want of care after the walk to Mauston, was clearly a question of fact for the jury. It does not appear from the record that any instruction upon this point was asked for by either party on the trial. There is, therefore, no error upon this point in the instruction. The evidence is not so clear that the damage was caused by the subsequent neglect of the plaintiff to procure proper medical attendance, as would justify this court in setting aside the verdict as against the evidence.

By the Court. — The judgment of the circuit court is affirmed.

COLE, C. J., and LYON, J., dissent.

The appellant having moved for a rehearing, the following opinion was filed April 5, 1882:

TAYLOR, J. Although the learned counsel for the appellant has made a very vigorous, not to say denunciatory, attack upon the opinion filed in this case, we do not deem it proper to deviate from our ordinary rule of denying the motion for rehearing without comment, when no questions are raised or argued upon such motion which were not fully argued at the original hearing. In denying this motion we deem it proper to say that the intimation of the learned counsel for the appellant that this case was not thoroughly argued at the original hearing, or carefully considered by the court before the opinion was delivered, is hardly just to either the counsel or the court. Certainly, on the part of the court, we intended to give it that careful consideration which its importance demanded, and we are not conscious that we have failed in our duty in that respect; and after reading the very carefully prepared brief submitted by the learned counsel for the appellant, and hearing his clear and forcible oral argument at the original hearing of this case, we think he does injustice to himself in suggesting that the points decided were not thoroughly argued at such hearing.

By the Court. — Motion denied.

Boardman and another vs. The Westchester Fire Ins. Co. of New York.

**BOARDMAN and another vs. WESTCHESTER FIRE INSURANCE
COMPANY OF NEW YORK.**

December 15, 1881 — March 14, 1882.

DISCRETIONARY ORDERS. (1) *View of premises.*

REVERSAL OF JUDGMENT. (2) *Errors must appear from record.* (3) *Arguments of counsel not grounds of error.*

1. It is discretionary with the trial court whether it will permit the jury, on motion of a party, to view premises or property; and its determination on that point will not be reviewed on appeal.
2. If the jury are guilty of any misconduct in making the view, or the court errs in instructing them as to the effect they may give to matters which have fallen under their observation while making it, the appellant must cause such misconduct or such erroneous instruction to appear by the bill of exceptions.
3. What was said by counsel by way of argument to induce the court to order a view to be taken by the jury, cannot be alleged for error.

APPEAL from the Circuit Court for *Outagamie* County.

Action by *James S. Boardman* and *Olla M. Campbell* on a policy of insurance against fire issued by the defendant company to the plaintiff *Campbell*. *Boardman* claimed as mortgagee of the premises, to whom the policy was made payable as his interest might appear. There was a judgment in favor of the plaintiff; from which the defendant appealed.

For the appellant there was a brief by *Collins & Pierce*, and oral argument by *Mr. Pierce*.

For the respondents there was a brief by *H. D. Ryan* and *W. J. Allen*, and oral argument by *Mr. Allen*.

The following opinion was filed January 10, 1882:

TAYLOR, J. The appellant makes the following assignments of error: (1) That the court erred in allowing the plaintiffs to give evidence showing that the plaintiff *Olla M. Campbell* had no children at the time of her husband's death; (2) in allowing proof of the personal property destroyed by the fire, because there was no sufficient allegation in the complaint of

Boardman and another vs. The Westchester Fire Ins. Co. of New York.

proofs of loss given to the company; (3) in allowing the jury to view the ruins of the premises destroyed by the fire; (4) in admitting evidence that the plaintiffs had not made proofs of loss to the Atlas company.

The two first assignments of error are not strenuously urged upon the court. They are based upon the alleged insufficiency of the complaint in setting out the plaintiff *Campbell's* interest and in alleging the making of the proofs of loss. The complaint alleges generally that the plaintiff *Olla M. Campbell* had at the time of the insurance, and at the time of the loss, an insurable interest in the property insured of a greater value than the amount of the policy. The evidence objected to was given on the trial to establish her title to the real estate insured. The proofs showed that it had been owned by her husband at the time of his death, and the fact that she had no children at the time of her husband's death was a part of the proof necessary for her to make in order to show that she inherited the same from her husband. The evidence, we think, was clearly admissible.

The objection that the complaint did not sufficiently allege that proofs of loss had been made after the loss and sixty days before the commencement of the action, is clearly unfounded. The complaint alleges in general terms that she had fulfilled all the conditions of said insurance on her part, and had performed all the conditions of said policy precedent to a recovery in a suit at law upon the same. This general allegation is a sufficient allegation of the service of proofs of loss, under section 2674, R. S. The complaint further alleges that more than sixty days had elapsed before the commencement of the action since the proofs of loss had been made by the said *Olla M. Campbell*, as required by the conditions of the policy, and received at the office of the defendant. We think this allegation entirely sufficient to show that a cause of action had accrued to the plaintiff to recover the amount of the insurance money, under the condition contained therein that the

Boardman and another vs. The Westchester Fire Ins. Co. of New York.

payment of the loss should not be made until sixty days after notice of loss and proof of the same received at the office of the defendant.

The third assignment of error is the one principally relied upon by the learned counsel for the appellant. He insists that it was error to allow the jury to view the premises under the circumstances disclosed in the bill of exceptions. The objection is not so much to the impropriety of the action of the court in ordering a view of the premises, as it is to the remarks made by the counsel for the respondents in making their application to the court for such view. As to the power of the court to direct a view to be made under section 2852, R. S., in a case of this kind, there can be no doubt. The section is very general in its terms. It reads as follows: "The jury may, in any case, at the request of either party, be taken to view the premises or place in question, or any property, matter or thing relating to the controversy between the parties, when it shall appear to the court that such view is necessary to a just decision: provided, that the party making the motion shall advance a sum sufficient to defray the expenses of the jury and the officers who attend them in taking the view; which expenses shall afterwards be taxed like other legal costs, if the party who advanced them shall prevail in the action."

This court held in *Pick v. Hydraulic Company*, 27 Wis., 433, that whether a view should be granted or not in a given case was purely a matter in the discretion of the trial court, and that this court would not review the decision of the trial court upon appeal from the judgment. Justice Lrox, who wrote the opinion, says: "During the progress of the trial, and after all the testimony in the action had been introduced, the defendant, by its counsel, moved that the jury might be taken to view the premises in question, and offered to advance sufficient money to defray all the expenses of such view. The court denied such motion, and an exception was duly taken to the ruling of the court. We think that it is purely a matter of dis-

Boardman and another vs. The Westchester Fire Ins. Co. of New York.

cretion with the court to order or to refuse to order a view by the jury, and that we cannot review the decision upon an application or motion therefor." In the case at bar the court ordered the view, and if the case is one in which a view might, under any circumstances, be ordered, then the making of such order cannot be a sufficient ground of error for a reversal of the judgment rendered in the action. We are very clear that the terms of the statute above cited are sufficiently broad to cover a case like the present, and it was therefore a matter of discretion with the court below whether the order should be granted or refused.

Whether the jury misconducted in making the view of the premises, or whether the court erred in instructing them as to what effect they should give, in making up their verdict, to matters which came under their observation while making the view, does not appear from the record in this case. We are to presume that the jury conducted properly, in making the view, and that the court properly instructed them upon what effect they should give to such matters as came under their observation while making the same. The record as presented to this court is entirely silent on that subject. The charge of the court to the jury is not made a part of the bill of exceptions, and we must therefore presume that the jury conducted properly, and that the judge, if he instructed them at all upon the subject, instructed them rightly.

What was said by the counsel for the respondent by way of argument to induce the court to make the order, cannot be alleged as error. If this court should undertake to reverse the judgments and orders of the lower courts because fallacious arguments or erroneous propositions of law were urged upon the consideration of the trial court for the purpose of inducing it to make such order or judgment, we would open up a new and prolific source of errors, which would render nearly every judgment or order made by a court subject to reversal. All that this court can consider is the fact that the order was made, and whether the court had authority to make it. If the coun-

 Baker vs. The State.

sel for the appellant supposed he had been injured by the misconduct of the jury in making the view, or by any improper instructions given to them by the court as to the effect such view should have in determining their verdict, they should have made such errors appear in the bill of exceptions in the case.

The fourth assignment of error does not seem to have been relied upon by the appellant. There is certainly nothing in the bill of exceptions which shows that the existence of the Atlas company's policy in any way affected the liability of the appellant upon its policy.

By the Court.—The judgment of the circuit court is affirmed.

A motion for rehearing was denied March 14, 1882.

 BAKER VS. THE STATE.

January 19 — March 14, 1882.

STATUTE CONSTRUED: CONSTITUTIONAL LAW. *Criminal liability of banker taking deposits, etc., with knowledge of his insolvency.*

1. Under sec. 4541, R. S., any person who is himself engaged in the business of a banker or broker in this state, and who receives money, paper circulating as money, or commercial paper, on deposit or for safe keeping, etc., when he knows or has good reason to know that he is "unsafe or insolvent," is liable to be punished as provided in that section; and such liability is not confined to officers, clerks or agents of corporations or individuals engaged in such business.
2. Said statute is not in conflict with the 14th amendment of the federal constitution (which declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws"), nor with any provision of our state constitution, but is valid.

ERROR to the Circuit Court for *Fond du Lac* County.

The plaintiff in error was arrested and taken into custody, July 2, 1881, by the sheriff of Fond du Lac county, upon a

Baker vs. The State.

warrant duly issued by a justice of the peace of that county, containing the following recitals: "That *Robert A. Baker* did, on the 4th day of May, 1881, at the city of Fond du Lac in said county, *feloniously* accept and receive on deposit, from the said Nicholas Serese, the sum of \$125 in money, and of that value, and being the property of the said Nicholas Serese and P. Serese; and that the said *Robert A. Baker* was then and there engaged in a banking and deposit business, at said city and county of Fond du Lac, Wisconsin, in *Robert A. Baker's* bank; and that the money aforesaid was accepted and received in said *Robert A. Baker's* bank on deposit by the said *Robert A. Baker*; and that he, the said *Robert A. Baker*, at the time when he took said money on deposit in his said bank, knew, or had good reason to know, that said bank and he, the said *Robert A. Baker*, was unsafe and insolvent; that said bank and said *Robert A. Baker* was in fact then and there insolvent; against the peace," etc. While so held, the plaintiff in error sued out a writ of *habeas corpus*, upon a petition in due form, and caused the same to be served upon the sheriff, who made return thereto before the judge of the circuit court for Fond du Lac county, setting up the said warrant as the sole and only ground for the detention of the prisoner; and the plaintiff in error demurred to such return. The hearing of the issue thus joined was had before the said circuit court, and after full consideration the court entered an order denying the prayer of the plaintiff in error to be discharged, and remanded him to the custody of the sheriff of Fond du Lac county. Thereupon a writ of *certiorari* was issued out of this court, directed to the judge of said circuit court, to bring up the record and such adjudication for review.

Edw. S. Bragg, for the plaintiff in error.

The Attorney General, for the state.

CASSODAY, J. The arrest was made under section 4541, R. S., which reads as follows: "Any officer, director, stockholder,

Baker vs. The State.

cashier, teller, manager, clerk or agent of any bank, banking, exchange, brokerage or deposit company, corporation or institution, or of any person, company or corporation engaged in whole or in part in banking, brokerage, exchange or deposit business in any way, or any person engaged in such business in whole or in part, who shall accept or receive on deposit, or for safe-keeping, or to loan, from any person, any money or any bills, notes or other paper circulating as money, or any notes, drafts, bills of exchange, bank checks or other commercial paper for safe-keeping or for collection, *when he knows, or has good reason to know*, that such bank, company or corporation, or that such person, *is unsafe or insolvent*, shall be punished by imprisonment in the state prison not more than ten years nor less than one year, or by fine not exceeding \$10,000." This section is a revision of section 1, ch. 213, Laws of 1876.

1. Did the transaction of the plaintiff in error, as charged in the warrant, bring him within the provisions of this section? The charge in the warrant is, that *Baker*, being engaged in a banking and deposit business, accepted and received on deposit, as such banker, the money named, knowing, or having good reason to know, that he and his bank were unsafe and insolvent. Was such action on his part prohibited by the section quoted? It seems to be conceded that it is applicable to the "cashier, teller, manager, clerk or agent" of a party so engaged; but the contention is that it does not apply to an individual who is himself engaged as principal or proprietor of such business. The difficulty in construing the section is the multiplicity of parties to which it is sought to be made applicable. The meaning of the section may be more apparent by omitting such words as are not applicable here, and all parties except the principal or proprietor of such business. By such elimination the section would read: "Any person engaged in such (banking, brokerage, exchange or deposit) business in whole or in part, who shall accept or receive on

Baker vs. The State.

deposit, or for safe-keeping, or to loan, from any person any money, . . . *when he knows, or has good reason to know, that such bank, company or corporation, or that such person, is unsafe or insolvent,* shall be punished by imprisonment," etc.

The words "unsafe or insolvent" would seem to be as applicable to the individual so engaged as to "such bank, company or corporation." Since this is so, and since the act sought to be punished is such acceptance or receiving by one knowing or having good reason to know that such bank, company or corporation, or "*such person, is unsafe or insolvent,*" there would seem to be no ground for holding that the "cashier, teller, manager, clerk or agent of the person engaged in such business in whole or part," and so accepting or receiving with knowledge of his proprietor's insolvency, should be punished under the section, but that the proprietor himself, doing the same act, with as good, if not better, knowledge and means of knowledge, should be excluded from its operation. Any other construction renders nugatory the words "or any person engaged in such business in whole or in part," and the words, "or that such person;" and this the learned counsel for the plaintiff in error concedes to be one of the "logical deductions" of his argument. But we are constrained to believe that the prohibition is aimed at the person so engaged, as well as at the others named. We must therefore hold that the act charged brings the plaintiff in error within the provisions of this section.

2. It is urged that such legislation is prohibited by the clause: "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws," found in the fourteenth amendment to the constitution of the United States; and the following cases are cited in support of the contention: *Live Stock, etc., Ass'n v. Crescent City, etc., Co.*, 1 Abb. (U. S.), 398; *Slaughter-House Cases*, 16 Wall., 36; *Bartmeyer v. Iowa*, 18 Wall., 129. For an authoritative interpretation of that amendment we must look to the decisions of the supreme court of the United States. In the *Slaughter-*

Baker vs. The State.

House Cases, supra, it was held by that court that the legislature of Louisiana were not prohibited by that amendment from prescribing and determining the localities where the business of slaughtering animals for the city of New Orleans might be conducted, and prohibiting their being slaughtered anywhere else. Page 61. MILLER, J., giving the opinion of the court, said: "The power here exercised by the legislature of Louisiana is, in its essential nature, one which has been, up to the present period in the constitutional history of this country, always conceded to belong to the states, however it may *now* be questioned in some of its details." He then quotes approvingly from Chancellor Kent the following: "Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community." He then continued: "This is called the police power. . . . Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly-populated community, the enjoyment of private and social life, and the beneficial use of property." He then quotes approvingly from an able opinion by REDFIELD, C. J., in *Thorpe v. Railroad Co.*, 27 Vt., 149, the following: "It extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the state; . . . and persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health and prosperity of the state. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned." Page 62.

Counsel urge upon our consideration the reasoning of the

Baker vs. The State.

minority of the court in the *Slaughter-House Cases*. But the dissenting opinion concedes that the police power "undoubtedly extends to all regulations affecting the health, good order, morals, peace and safety of society, and is exercised on a great variety of subjects, and in almost numberless ways. . . . With this power of the state and its legitimate exercise I shall not differ from the majority of the court. . . . In the law in question there are only two provisions which can properly be called police regulations—the one which requires the landing and slaughtering of animals below the city of New Orleans, and the other which requires the inspection of the animals before they are slaughtered. When these requirements are complied with, the sanitary purposes of the act are accomplished. In all other particulars the act is a mere grant, to a corporation created by it, of special and exclusive privileges, by which the health of the city is in no way promoted." Page 37. Thus it was conceded by the minority of the court that the fourteenth amendment did not abridge nor take away the power of the state legislature to regulate all matters "affecting the health, good order, morals, peace and safety of society."

In *Bartemeyer v. Iowa*, 18 Wall., 129, it was held, in effect, by a united court, that the fourteenth amendment did not abrogate nor render nugatory a statute of Iowa prohibiting the sale of intoxicating liquors, but that the same was "within the police regulations of the states, left to their judgment, and subject to no other limitations than such as were imposed by the state constitution, or by the general principles supposed to limit all legislative power." Page 132.

In *McCready v. Virginia*, 94 U. S., 391, it was held that a law of that state prohibiting persons not citizens thereof from planting oysters in the soil covered by her tide-waters was not in violation of the constitution of the United States.

In *Munn v. Illinois*, 94 U. S., 113, affirming *S. C.*, 69 Ill., 80, it was held that the legislature of Illinois had power to regulate public warehouses, and the warehousing and inspec-

Baker vs. The State.

tion of grain within that state, and to enforce the same by penalties, and that such legislation was not in conflict with any provision of the federal constitution. "Police powers . . . are nothing more or less than the powers of government inherent in every sovereignty; that is to say, the power to govern men and things. Under these powers the government regulates the conduct of the citizens one towards another, and the manner in which each shall use his own property when such regulation becomes necessary for the public good. . . . Looking, then, to the common law, from whence came the right which the constitution protects, we find that when private property is affected with a public interest it ceases to be *juris privati* only. This was said by Lord Chief Justice HALE, . . . and has been accepted without objection as an essential element of the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." Pages 125-6. The opinion of the chief justice then goes on to show that such police regulations as to such use of private property do not "deny to any person within its jurisdiction the equal protection of the laws," within the meaning of the fourteenth amendment. Pages 134-5.

In sustaining the constitutionality of the prohibitory liquor law of Massachusetts, it was held, in *Beer Co. v. Massachusetts*, 97 U. S., 25, that "all rights are held subject to the police power of the state. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer."

Baker vs. The State.

In *Bradwell v. State*, 16 Wall., 130, it was held, in effect, that a law of a state was not in violation of the fourteenth amendment, because, in allowing admissions to the bar, it discriminated between citizens of equal age, character, learning and ability. So, a law of New York punishing every master of a vessel arriving from a foreign port in the city of New York who failed to report the names of all his passengers, with certain particulars of their age, occupation, last place of settlement, and place of their birth, was sustained as an exercise of the police power of the state (*City of New York v. Miln*, 11 Pet., 102, 139); and the same was approved in the *Slaughter-House Cases*, *supra*. See *U. S. v. De Witt*, 9 Wall., 41. With these decisions of the supreme court of the United States before us, we would not be justified in holding that the section of our statute in question is in violation of the fourteenth amendment of the constitution of the United States, or any other amendment or provision of that instrument.

3. It is urged that the statute in question is in violation of our state constitution, and hence null and void. The decisions of the supreme court of the United States, already cited, clearly recognize the inherent right of every state government, within constitutional limitations, to regulate the conduct of its citizens and the use of private property in matters pertaining to the public good. To these decisions of the federal court many might be added from state courts. For reference we cite a few: *Fry v. State*, 63 Ind., 552; *Ex parte Smith and Keating*, 38 Cal., 702; *People v. Harper*, 91 Ill., 357; *State v. Conlin*, 27 Vt., 818; *In re Ellen Dougherty*, *id.*, 325; *Austin v. State*, 10 Mo., 591; *Intoxicating Liquor Cases*, 25 Kan., 751; *In re Ruth*, 32 Iowa, 250; *Harrigan v. C. R. L. Co.*, 129 Mass., 580; *Carter v. Dow*, 16 Wis., 298; *Tenney v. Lenz*, *id.*, 566; *City of Milwaukee v. Gross*, 21 Wis., 241; *State ex rel. v. Ludington*, 33 Wis., 107; *Taylor v. State*, 35 Wis., 298; *Morrill v. State*, 38 Wis., 428; *Van Buren v. Downing*, 41 Wis., 122; *Milwaukee I. S. v. Milwaukee*

Baker vs. The State.

County, 40 Wis., 328; *Allerton v. Chicago*, 20 A. L. R., 473; *Cincinnati v. Bryson*, 15 Ohio, 625; *Cincinnati v. Buckingham*, 10 Ohio, 257; *Ash v. People*, 11 Mich., 347; *Boston v. Schaffer*, 9 Pick., 415; *Kitson v. Ann Arbor*, 26 Mich., 325; *Baker v. Cincinnati*, 11 Ohio St., 534; *Van Baalen v. People*, 40 Mich., 258; *State v. Hartfel*, 24 Wis., 60.

The cases cited involve a variety of statutes, each of which has been held to be a constitutional exercise of the police power of the state. They cover cases regulating the rafting of timber, the issuing and taking up of tickets by common carriers, the playing upon musical instruments after particular hours of the night, or in specified places, the presence of females at particular places after certain hours of the night, the inspection of grain and other articles, the location of slaughter-houses and packing-houses, the sale of meat and other articles of food, the keeping of dogs, the selling or giving away of liquor, the traveling from place to place within the state and selling, or exposing for sale, goods manufactured within the state, the taking and detaining of destitute children not guilty of crime, the licensing of hackmen, omnibus drivers, and others pursuing like occupations, the occupying of a place in the market, the keeping of a stall to sell fish, the running of a theatre, the business of pawnbrokerage, and the sale of intoxicating liquors to minors. These are a few of the many things which courts have held to be subject to the police power of the state. The existence of the power has never been doubted, but the difficulty arises from its application and the limitation of its boundaries.

The manifest object of the statute in question was to suppress the business of banking or brokerage by any insolvent person, company or corporation. It therefore inflicts punishment upon persons so engaged, knowing the fact. A banker is one who traffics in money, receives and remits money, negotiates bills of exchange, receives money in trust, to be drawn

Baker vs. The State.

again, or its equivalent, as the owner has occasion to use it. Banking is the business or employment of the banker, or the business of the bank. A broker is one who acts as agent, middleman or negotiator between other persons. See Dictionaries. The very nature of the business prevents it from being conducted by a person isolated from all communication with others. The business, therefore, not only affects the banker or broker, but every person who deals with him as such. The business is not confined to the property of the banker or broker, but involves all property passing through his hands or entrusted to his keeping. A bank implies capital, and capital invites confidence. A man holding himself out as a banker or broker thereby gives public proclamation that he has money, and property readily convertible into money, in his possession and subject to his control, and for that reason he may be safely trusted. It requires no argument to show that such assurance is most inviting and influential with the mass of the people, especially with those unacquainted with the history and character of the man. With them the banker or broker is entrusted with money merely because he is a banker or broker, and hence supposed to have surplus capital as a standing guaranty of his agreements and his integrity. For an insolvent banker, company or corporation to continue the business of banking is to hold out assurances of responsibility and surplus capital where neither exists. To do so knowingly is to secure the confidence, and hence obtain the money, of the ignorant and unwary by an implied deception. It is the old story of searing the victim by a display of false colors. To suppress this mischief, to save the public from being induced to deposit money with such insolvent by the implied assurance of responsibility and wealth essential to the business, when they do not in fact exist, was the evident purpose of the statute. Wisconsin is not alone in the enactment of such statutes. Similar statutes exist in Illinois, Iowa, Kansas, Louisiana, California, Missouri, South Carolina, and Michigan. See

Baker vs. The State.

Thompson, Liability of Officers & Agents of Corporations, 560, 562, 563, 564, 549, 591, 593, 596, 648, 580. These statutes, like our own, are of recent date, and we are not aware of the constitutionality of any of them having been brought in question in any court; but the extent of the legislation seems to indicate a pretty general belief in the legislative power.

Counsel cites two sections of our constitution, each of which is claimed to be violated: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs which he may receive in his person, property or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws." Section 9, art. I. Assuming the charge against the plaintiff in error to be well founded (which we must do for the purposes of the case, even though the fact is otherwise, as it may turn out to be), then, as we have already indicated, the only ground for alleging injury, wrong or injustice to the plaintiff by reason of the statute is the punishment inflicted for knowingly obtaining money by implied deception, which would otherwise not have been punishable. The statute, however, is to prevent injury and wrong to the public, and to furnish a barrier against its commission. We are clearly of the opinion that this section of the constitution has no bearing upon the question before us. The other section referred to is section 16, art. I, which reads: "No person shall be imprisoned for debt arising out of or founded on a contract, expressed or implied." The imprisonment here is not for any debt, much less for a debt arising out of or founded on any contract, but upon a charge of an act made a misdemeanor by the statute, to wit, the receiving of money on deposit as a banker by one knowing himself or such bank to be insolvent. The case manifestly does not come within the prohibition of that section. *Cotton v. Sharpstein*, 14 Wis., 226; *In re Mowry*, 12 Wis., 52; *Howland v. Needham*, 10 Wis., 495. The design of the law seems to be healthful and

 In re Orton.

for the public good, and in our opinion it is not in violation of any express or implied provisions of the state or national constitution. Whether its enactment was wise and politic, was a matter for the legislature to determine, and not for the court.

By the Court.—The order of the circuit court is affirmed.

 IN RE ORTON.

January 20 — March 14, 1882.

DISBARRING ATTORNEY. (1) *Appealable order.* (2) *How attorney to be notified of charges.* (3) *Court may act on its own motion.*

1. An order of the circuit court forever disbaring an attorney and prohibiting him from practicing law in the courts of this state, *held* appealable under subd. 2, sec. 3069, R. S., as a final order affecting a substantial right made in a special proceeding.
2. Where the proceeding to disbar an attorney is by order to show cause, the charges against him should clearly appear in the order itself, or in some instrument appended thereto or (at least) on file; and even when the charges are to be supported by pleadings filed by such attorney, the charges themselves should be distinctly specified.
3. The circuit court may properly, *on its own motion*, require an attorney to show cause why he should not be disbarred, when pleadings filed by him appear to require an investigation of that character.

APPEAL from the Circuit Court for *Milwaukee* County.
The case is sufficiently stated in the opinion.

For the appellant there was a brief by *D. H. Johnson*, and oral argument by *Mr. Johnson* and *Wm. F. Vilas*.

H. M. Finch, contra.

COLL, C. J. This is an appeal from an order of the circuit court of Milwaukee county, which directs that the appellant be forever disbarred from the right to practice law in the courts of this state, and also directs that his name be stricken from

In re Orten.

the roll of attorneys of said circuit court. A preliminary objection is taken by the learned counsel who appears here to sustain the correctness of the order, that it is not appealable. He insists that the proper remedy to restore a disbarred attorney to his rights and privileges is by *mandamus* to the court disbarring him. This point was not seriously urged as an objection to our reviewing the order, but it must be considered. It appears to us that the order may well be held appealable under subd. 2, sec. 3069, R. S., as being a final order affecting a substantial right, made in a special proceeding. That an order prohibiting an attorney from practicing law, which practically deprives him of the means of supporting himself and family—which blasts all his prospects for professional fame and eminence, and leaves a stain on his good name and character,—is an order affecting a substantial right, is a proposition too plain for discussion. There may be a class of cases where an attorney is disbarred as a punishment for contemptuous language or conduct in the presence of the court, where the proceedings would be treated as *quasi* criminal (see *In re Kelly*, 59 N. Y., 596), and where the rule laid down in bastardy cases (*State v. Mushied*, 12 Wis., 561, and *State v. Jager*, 19 Wis., 235), or in criminal contempts (*In re Murphey*, 39 Wis., 286), would apply. But we think these decisions are not strictly in point. This question was considered in the *Eldridge Case*, 82 N. Y., 161, where a similar order was held appealable. In that case a distinction is made between proceedings for a contempt occurring in the presence of the judge, where the facts constituting the offense are certified by him, and a case of professional misconduct out of the immediate presence of the court, where the actual truth is a matter of evidence. In the latter case the court affirms its right to review the order on appeal. The cases of *Ex parte Bradley*, 7 Wall., 365, and *Ex parte Robinson*, 19 Wall., 511, which are relied on by counsel to sustain the position that *mandamus* is the proper remedy to restore a disbarred attorney to

In re Orton.

his rights and privileges, are commented on in the *Eldridge Case*, and the decisions shown to be inapplicable. The language of the appeal statute above cited clearly embraces this order; and we see no sufficient reason for holding that it cannot be reviewed on appeal. See *Witter v. Lyon*, 34 Wis., 564; *In re Cooper*, 22 N. Y., 67; *In re Percy*, 36 N. Y., 651; *In re Gale*, 75 N. Y., 526.

But another question of practice is raised by the counsel for the appellant, which is of much practical importance. He claims and insists that the whole course of procedure adopted and pursued in this case was irregular and absurd to the last degree, and that the order should be reversed on that ground. The proceeding was instituted in this manner: In August last, when the circuit court of Milwaukee county was in session, the attention of the circuit judge was called to the pleadings in a case pending in that court, in which one Russell Wheeler was plaintiff and the appellant was defendant. The pleadings on file consisted of a complaint and a verified answer. At the same time, it is admitted, there was read what purported to be a copy of a copy of an amended answer in the same case, which had been served by *Mr. Orton* on Wheeler's attorneys, and which they had returned to him, with their reasons for not accepting service thereof. This copy of a copy of the amended answer was filed. Thereupon the court, on its own motion, made an order requiring the appellant to show cause on a day named, at the opening of court on said day, why his license as an attorney should not be revoked and annulled, and his name stricken from the roll of attorneys, and he be disbarred from longer practicing the profession of law. The clerk was directed to serve a true and certified copy of the order on *Mr. Orton* within three days from its date. The order specifies no charges whatever, nor any misconduct on the part of *Mr. Orton*, to which he was called upon to answer. On the hearing of the rule *Mr. Orton* moved to vacate the order, because it had been improvidently granted — there being no

In re Orton.

charges specified as the foundation of the same, — and because no complaint or charges of any kind had been made against him. This motion was denied, and other steps were taken.

It is very correctly remarked by appellant's counsel, that the practice in proceedings of this kind is not prescribed by statute nor regulated by rules of court. But still that certain general rules and principles apply to it cannot be doubted. One of these principles, which is axiomatic in the law, would seem to be this: An attorney who is proceeded against for misbehavior in his profession, is certainly entitled to know the nature and ground of the accusation made against him. If charges of professional misconduct are made, common justice requires that he should know just what they are, and have a full opportunity to meet them. Therefore, specific, distinct, special charges should be clearly made, in some form and in some manner, before he is called upon to make his defense. "This power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice. It is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession; and except where matters occurring in open court, in the presence of the judges, constitute the grounds of its action, the power of the court should never be exercised without notice to the offending party of the grounds of the complaint against him, and affording him ample opportunity of explanation and defense. This is a rule of natural justice, and is as applicable to a case where a proceeding is taken to reach the right of an attorney to practice his profession, as it is when the proceeding is taken to reach his real or personal property." *Bradley v. Fisher*, 13 Wall., 335, 354.

The order to show cause, as we have said, stated no charges or grounds of complaint. It did not even specify what things in the verified or amended answer *Mr. Orton* was called upon

In re Orton.

to explain, justify or deny. It is said that no formal charges of professional misconduct were necessary, because *Mr. Orton* had shown, in his answer in the *Wheeler Case*, that he had been guilty of acts which rendered him utterly unworthy to be a member of the bar. But what were those acts or things which established his unfitness to practice law? The character of those answers will deserve notice by and by. It is sufficient now to say that they contain many allegations and statements relating to different transactions. *Mr. Orton* was entitled to know on what particular acts or things stated in those answers he was to be tried. No better illustration of the necessity of requiring specific charges of misconduct to be made could be afforded than the history of this case. The circuit judge, in the final order disbarring *Mr. Orton*, states that he does so, for substantially these reasons: (1) That he had been guilty of unprofessional conduct in advising Russell Wheeler how to kill a man and be justified in the law, as appears from his answer in the *Wheeler Case*; and (2) that it appeared from the same answer that *Mr. Orton* had been guilty of subornation of perjury, or some offense of that nature, in preparing for the defense of said Wheeler against the charge of murder. The learned counsel who argues in favor of the correctness of the order, does not rely on these things alone to sustain it, but he says there are other matters stated in the answers which fully justify the expulsion of *Mr. Orton* from the bar. He refers to what is said by *Mr. Orton* in his original answer about furnishing Mr. Wheeler with money for the purpose of gambling; also to his aiding Wheeler in placing his property beyond the reach of creditors, and other things. Now, to our minds, this forcibly demonstrates the wisdom and necessity of having distinct and specific charges made in some proper way, in a proceeding which may result in such serious consequences as striking the name of an attorney from the rolls and depriving him of the right to practice his profession; for *Mr. Orton* might well complain, as he did, that he did not know what

In re Orton.

charges founded on his answers he was called upon to explain and justify. The learned circuit court expels him on one ground, and learned counsel say he might properly be disbarred on other grounds and for other things stated in his answers. Where the proceeding is by rule, as in this case, the order should state the substance of the charges of unprofessional conduct, so that the attorney may know precisely what he is called upon to meet. This practice should be observed even where the order or rule to show cause is founded upon pleadings and records before the court. In the order itself, or in some instrument appended to it, the charges should be specified, or, at all events, they should be drawn up and filed before the attorney is called upon to make his defense. "This is a rule of natural justice, and should be equally followed when proceedings are taken to deprive him of his right to practice his profession as when they are taken to reach his real or personal property; and such has been the general, if not the uniform, practice of the courts of this country and of England. There may be cases, undoubtedly, of such gross and outrageous conduct in open court on the part of the attorney as to justify very summary proceedings for his suspension or removal from office; but even then he should be heard before he is condemned." *Ex parte Robinson*, *supra*, 512. To be heard, he must, of course, know what he is to answer.

In *Ex parte Cole*, 1 McCrary, 406, and *People v. Pearson*, 55 Cal., 472, the proceedings were by information, wherein the accusations or charges were fully and clearly stated. In *In re Wool*, 36 Mich., 299, the order to show cause was based upon a decree in equity, which decree rested on a fraud charged to have been practiced by the attorney. The charges of fraud were set forth in the bill filled against the attorney, and constituted the only basis of the action. It does not appear that any objection was taken that the charges were not made in a sufficiently formal and specific manner. In *Strout v. Proctor*, 71 Me., 288, charges and specifications of misconduct were

In re Orton.

made as the foundation of the rule to show cause. In *In re Percy, supra*, the order to show cause was based upon the papers presented to the court, which were served upon the attorney, and the order specified the charges. What practice was adopted in *In re Gale, supra*, it is impossible to determine from the case as reported. I have been unable to find the case in the reports of the supreme court. In *In re Eldridge, supra*, we infer, the charges of misconduct were set forth in the affidavits and papers upon which the proceedings were instituted. Certainly the certified copy of the order to show cause, with which we are favored, states that he was guilty of misconduct as an attorney in this, viz.: "Subornation of perjury of witnesses produced by him on the hearing" of the probate of a certain will before the surrogate. The court regarded these affidavits and papers as performing the office of a pleading, and presenting the issue to be tried. But if there were no adjudged cases to sustain our view as to the proper practice in cases of this nature, still we should say, upon general principles applicable to all cases, that specific and distinct charges of professional misconduct should be clearly made in some proper form before the attorney is called upon to show cause why he should not be disbarred. Mr. Weeks, in his work on Attorneys, says: "The practice in the English and American courts is for the court to issue a rule upon the attorney, reciting the substance of the information or charges against him, and requiring him to show cause why he should not be stricken from the roll. . . . Specific and pertinent charges must be made, and judgment entered on the process, otherwise he cannot be suspended or removed." Page 155, § 83. In a case of this importance we are clearly of the opinion that some such practice should be followed.

The fact that the circuit court, on its own motion, granted the order to show cause, requires no comment. It was the duty of the circuit judge, on his attention being called to the pleadings in the case of *Wheeler v. Orton*, pending before

In re Orton.

him, to issue such an order if he thought there was anything in the answers of *Mr. Orton* which the interest of the public or the integrity of the profession required should be investigated. Courts institute these proceedings on their own motion when papers are presented showing that there are probable grounds for believing that attorneys have been guilty of acts of misconduct in their practice which render them unfit longer to be members of the bar. *Anon.*, 22 Wend., 656; *In re Peterson*, 3 Paige, 510; *In re Brewster*, 12 Hun, 109. But, as we have said, the order properly should have stated what acts of misconduct or what things in his answers *Mr. Orton* was called upon to defend or explain.

We feel it to be our duty to make some further observations on two points before taking leave of the case. And first as to the merits. On showing cause *Mr. Orton* read and filed his affidavit in explanation of certain matters stated in his original and amended answers. If the answers, with the affidavits explaining the same, are read and considered together — as, of course, they must be on this inquiry, — we think they fail to sustain the conclusion of the learned circuit judge, that *Mr. Orton* had been guilty of the gross misconduct of advising Mr. Wheeler how to kill a man and be justified in the law, or that he had been guilty of the unprofessional misconduct of subornation of perjury, or anything of the kind. It is needless to observe that such grave charges, which, if true, would not only justify the expulsion of *Mr. Orton* from the bar, but would render him liable to severe punishment under the penal law, should be established by clear and satisfactory evidence, and cannot rest in doubtful and uncertain inferences.

We do not propose to go into any analysis of the answers, either with or without the aid of the explanatory affidavit. Suffice it to say that they entirely fail to sustain the conclusions or inferences which the learned circuit judge drew from them.

The able and intelligent counsel who argued this case for the appellant, did not attempt to defend or justify the character of

Boland, clerk, etc., vs. Benson and others.

the answers as pleadings; and his silence in that regard reflects credit upon his candor and his high standing at the bar. The answers as pleadings would be absolutely indefensible in any tribunal of justice. They contain matters which are not only impertinent and improper as constituting any defense to the action, but which are outrageously indecent and scandalous. There is no justification or excuse for placing such reprehensible pleadings on file, which derogate from the dignity of courts and are contrary to all honorable practice. If the circuit judge had directed these answers to be stricken from the files, and had administered a severe reprimand to the attorney who drew and placed them there, he would have treated the answers and their author as they deserved. It is painful to comment on such things, but the dignity of the court and the honor of a noble profession require it should be done. It is inconceivable how an old, able and experienced attorney, who generally has such a correct appreciation of the high duties and morality of his profession, could so far forget himself as to draw up and place on file answers which contain such scandalous and reprehensible things. It is to be hoped that these pleadings will never be followed as a precedent by any attorney of the Wisconsin bar.

By the Court.—The order of the circuit court is reversed.

ORTON, J., took no part.

BOLAND, Clerk, etc., vs. BENSON and others. [Motion to modify Judgment.]

February 7—March 14, 1882.

SUPREME COURT. *Limit of power to modify its own judgment.*

This court has no power to modify its own judgment as to costs, rendered at a former term, as by changing it from a judgment against the plaintiff (who brought the suit in his official capacity upon an assignee's bond) to a judgment against the person for whose benefit the suit was brought.

Boland, clerk, etc., vs. Benson and others.

APPEAL from the Circuit Court for *Brown* County.

Defendants moved to modify the judgment for costs of this court.

J. J. Tracy, for the motion.

H. W. Lander, *contra*.

LYON, J. On the appeal in this case the judgment of the circuit court was reversed for an error in the taxation of costs. 50 Wis., 225. Judgment for costs was thereupon rendered in this court against the plaintiff, at the August term thereof, 1880. The action was upon the bond of an assignee, and was prosecuted by the clerk of the court for the benefit of Mr. Lander alone. The defendants, at this January term, 1882, move for a modification of the judgment of this court, so that it shall be a personal judgment against Mr. Lander. It may be that Mr. Lander is liable for the amount of the judgment, under R. S., sec. 2932, but the motion comes too late for us to modify the judgment. It would be a mere affectation to cite authorities to the rule that a court has no jurisdiction to reverse or revise its own judgments rendered at a previous term, unless such authority is given by statute. This motion is not based upon any statute. There are some apparent, rather than real, exceptions to the rule, but this case is not within any of them. The rule and apparent exceptions have often been fully considered and applied by this court, and nothing need be added to what is said on the subject in *Scheer v. Keown*, 34 Wis., 349, and the cases there cited. See also the late case in supreme court of the United States, of *Bronson v. Shulten*, 13 Rep., 289.

By the Court.— Motion denied without costs, except clerk's fees.

Powers vs. Dellinger.

POWERS VS. DELLINGER.

*February 7 — March 14, 1882.*JUDGMENT ON VERDICT: (1, 2) *Reversal of, on evidence.*SALE OF CHATTELS. (3) *Contract as to time of payment applied.*

1. A judgment upon verdict will not be reversed upon the weight of evidence, where there is evidence sufficient to support the verdict.
2. A judgment upon verdict against defendant for the value of the whole of certain chattels is reversed for want of any evidence of defendant's liability as to a part of the chattels.
3. Where D. purchased chattels of P., to be paid for when used or disposed of by D., and a part of them, remaining in store, were destroyed by fire: *Held*, that D. thereupon became immediately liable for the price of the chattels so destroyed; but that he would not become bound to pay the price of those remaining undestroyed, until he should use or dispose of them, or until, at least, a reasonable time should elapse to enable him to do so.

APPEAL from the Municipal Court of the *City of Ripon*.

Action to recover the price of 590 flour barrels, alleged to have been sold by the plaintiff to the defendant, April 5, 1880, amounting to \$212. It appears that the plaintiff, with the consent of the defendant, had stored in a building of the latter, known as the "old mill," that number of barrels at his own risk. The testimony of the plaintiff tended to show that immediately thereafter, and at the date aforesaid, the defendant purchased the barrels of the plaintiff at an agreed price per barrel, to be paid for when used or disposed of. The old mill in which the barrels were stored was burned in June following, and all the barrels except 163 of them were burned. Those saved from the fire were taken by third persons and stored under the cooper-shop of the plaintiff, who assisted in placing them there. The plaintiff notified the defendant that the barrels were there, subject to his order, but the latter did not take them. The defendant in his testimony denies that he purchased the barrels, and says that the plaintiff told

him, if he wanted to use any of them, to do so and give the plaintiff credit for them. The judge instructed the jury, among other things, as follows: "If you find, from examination of all the evidence given, that the defendant agreed with the plaintiff to purchase these barrels and pay for them when he used or disposed of them, and that the defendant has used or disposed of them, you will find for the plaintiff the sum of \$212, the full amount claimed." The jury found for the plaintiff, and assessed his damages at \$212. A motion for a new trial was denied, and judgment was entered pursuant to the verdict. The defendant appealed from the judgment.

The cause was submitted on the brief of *E. L. Runals* for the appellant, and that of *W. W. D. Turner* for the respondent.

LYON, J. Several alleged errors are assigned and are discussed in the briefs of counsel, but we find it necessary to consider but one of them. The principal question of fact litigated on the trial was, Did the defendant purchase the barrels in controversy of the plaintiff? This question seems to have been fairly submitted to the jury, and they have resolved it in the affirmative. Whatever our opinion may be of the weight of the testimony, there is sufficient testimony to support the verdict. It is a verity in the case, therefore, made so by the verdict, that the defendant purchased the barrels theretofore stored by the plaintiff in the old mill. That being so, the defendant became the owner of the barrels, and they were at his risk. Hence, he became liable for the price of those burned, immediately upon their being destroyed. But this rule does not apply to the 163 barrels saved from the fire. It satisfactorily appears by the plaintiff's testimony that he took these into his own possession. He assisted in placing them in his building, and notified the defendant that they were there subject to his order. He did so without the consent or knowledge of the defendant, and it cannot be correctly said that the defendant

Foster vs. Taggart.

has used or disposed of these barrels. Until he does so, or, at most, until a reasonable time for him to do so has elapsed, he is not liable for the price of them under the contract. No question of reasonable time is presented in the case. The instruction quoted in the above statement of the case does not discriminate between the barrels burned and those saved, in respect to the liability of the defendant. It submits to the jury the question of fact whether those saved, as well as those burned, were used or disposed of by the defendant, when there is no evidence that those saved were so used or disposed of. In this, we think, the learned judge of the municipal court erred. As the proofs stand, the plaintiff was not entitled to recover the price of the 163 barrels saved; yet he has recovered for these as well as for the others.

For this reason the judgment of the municipal court must be reversed, and the cause remanded for a new trial.

By the Court.—So ordered.

FOSTER VS. TAGGART.

February 7—March 14, 1882.

CAUSE OF ACTION. *Damages for false representations in sale of securities.*

In an action not for a rescission but for damages for the false representations of defendant in the sale of a note and mortgage, where the validity of the instruments is not denied, and it does not appear that the mortgage has been foreclosed, the complaint is bad if it fails to show that the securities are insufficient, and what would be the probable deficiency upon a sale on foreclosure of the mortgage.

APPEAL from the Circuit Court for *Fond du Lac* County.

Action to recover damages for false representations made by defendant to the plaintiff in the sale of a note and mortgage. On the trial, defendant's objection to the admission of any evidence under the complaint, on the ground that it did

Foster vs. Taggart.

not state a cause of action, was overruled. From a judgment entered in favor of the defendant for costs, etc., the plaintiff appealed.

The cause was submitted for the appellant on a brief signed by *J. J. Foote* and *E. L. Runals*, as his attorneys, with *E. S. Bragg*, of counsel.

C. W. Felker, for the respondent.

ORTON, J. Objection was taken to any evidence under the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action; and such objection was sustained by the court. The action is for deceit or false representations by the defendant in the sale of a note and mortgage, and for damages occasioned thereby. The representation was, (1) that the mortgage was good, first-rate security for the sum promised by the notes and interest; (2) that \$800 to \$1,000 had been several times offered for one 40 of the 160 acres of land mortgaged, and that the defendant did not consider the 40 for which the offer was made better than either of the others; (3) that the premises were improved; and (4) that the mortgagor lived on the land. The further allegations material to be considered were: "That the plaintiff, believing at the time said representations to be true, and relying thereon, was thereby induced to purchase the said notes and mortgage of the said defendant, and did so purchase the same, and to pay and did pay to the defendant \$1,050 therefor; and that the said representations and each of them were *then and there false* and untrue, and known by the defendant at the time to be so; . . . that [the mortgaged premises] were not *then* an adequate security for more than \$200; that the defendant never pretended or claimed that [the mortgagor] was personally responsible for any sum whatever, and this plaintiff believes that if any such person exists he is wholly irresponsible and insolvent, and was at the time of the purchase, . . . to the damage of the plaintiff of \$850 and interest from the 15th day of August, 1874."

Foster vs. Taggart.

The purchase was made at the last-mentioned date, at the city of Ripon, between thirty and fifty miles distant from the mortgaged premises. This suit was brought in 1879.

These representations are material only as they go to the adequacy and sufficiency of the mortgage as security for the note, and the damages are measured by the deficiency. This is not an action to rescind a bargain, or to recover the value of lands purchased by the inducement of fraud. It is to recover that part of the debt which the mortgage fails to secure. The maxim of universal application is, that "fraud without damage, or damage without fraud," does not constitute a cause of action. In such a case "the *gravamen* of the charge is, that the plaintiff has been deceived to his *hurt*, not that the defendant has gained an advantage." *Fisher v. Mellen*, 103 Mass., 505; Bingham on Sales, § 429; Cooley on Torts, 62. The general rule respecting fraud in sales is, that the damage is to be ascertained by the difference between the real value of the thing sold and the value according to the representations at the time of the purchase or of the representations. But such cannot be the rule in a case like this. The damage or loss, if any, could have been ascertained at any time by foreclosure and sale, and in this way only could the real damage or loss be ascertained with certainty. Not having foreclosed, such damage can now only be approximated by the testimony of witnesses, by opinion or otherwise, as to the market value of the mortgaged property, as the probable amount which could have been realized by foreclosure.

If the plaintiff had foreclosed the mortgage, and realized his entire debt and costs, at any time since the purchase, no one would contend that he could then have brought this action and recovered the difference between the market value of the mortgaged premises and its represented value at the time of the purchase, without reference to what he had already realized by the foreclosure. In that case the question would be, What was the real deficiency? and in this case it is, What would be the probable deficiency in case of foreclosure at the time this

Foster vs. Taggart.

action was brought? This makes the question of the value of the mortgage security at the time this action was commenced, a vital and material one, and such fact must of necessity be proved in order to ascertain what damage, if any, the plaintiff has suffered by the fraud. For aught that appears by this complaint, the mortgaged premises were ample security for the note, and the plaintiff has lost nothing. If essential to be proved, then this fact must be averred, to constitute a cause of action. "The *probata* and the *allegata* must concur," the counsel on both sides of the argument admit. The absence of any averment that the mortgaged premises were insufficient in value to secure the note, and the extent of such insufficiency at the time the action was commenced, is a defect fatal to the complaint. It does not appear by any allegation, presumption or inference, that at the time the action was brought the plaintiff had suffered any damage whatever by reason of the misrepresentation.

In cases of the purchase of land by the inducement of fraudulent representations of its value, the purchaser may not be affected by any change of its value after the purchase, and he would be entitled to the profits of his bargain. But not so here: the plaintiff can only recover what he has finally lost by the fraud in the deficiency of his security. This complaint studiously states the comparative value of the mortgaged property, and the loss and damage at the time of the purchase. It seems clear that the case as made by the complaint is one of mere fraud without damage. *Nye v. Merriam*, 35 Vt., 438; *Medbury v. Watson*, 6 Met., 246; *Adams v. Paige*, 7 Pick., 542; *Newell v. Horn*, 45 N. H., 422; *Randall v. Hazelton*, 12 Allen, 414; *Phipps v. Buckman*, 30 Pa. St., 402; *Bartlett v. Blaine*, 83 Ill., 25; *Castleman v. Griffin*, 13 Wis., 535; *Barber v. Kilbourn*, 16 Wis., 485.

For this defect in the complaint we think the objection to any evidence under it was properly sustained.

By the Court.—The judgment of the circuit court is affirmed.

Potter vs. Taggart.

POTTER VS. TAGGART.

February 7 — March 14, 1882.

PLEADING: PRESUMPTIONS: RESCISSION OF SALE. (1) *Demurrer* *ore tenus*; *presumptions to sustain pleading.* (2) *Complaint sufficiently alleges fraud in sale.* (3) *Notice of election to rescind sufficiently alleged.* (4) *When tender of thing sold need not be shown in action to rescind sale.* (5) *Effect of omission to aver plaintiff's readiness, etc., to restore property.*

1. A greater latitude of presumption will be indulged to sustain a complaint where the objection that it does not state a cause of action is first taken at the trial, than where it is previously taken by demurrer.
2. Action to rescind a sale of a note and mortgage, on the ground that plaintiff was induced to purchase by defendant's false and fraudulent representation that the lien of the mortgage still continued upon the whole of the land therein described, being sixty-two acres, when in fact twenty-two acres had been released by the defendant (the mortgagee). The complaint alleges that, because of such release, the mortgage and note became of little value, and that plaintiff had thereby "lost all the benefit and advantage which he would otherwise have derived from the purchase." On an objection to the complaint first taken at the trial: *Held*, that it sufficiently alleges a fraudulent representation or concealment, injurious to the plaintiff.
3. The complaint avers that, as soon as plaintiff learned the facts, he went to defendant "for the purpose of demanding of him a return" of the sum paid for the note and mortgage, "but the defendant then and there refused to do anything in regard to the matter, and then and there refused, and still does refuse, to return to plaintiff said sum or any part thereof." *Held*, that this sufficiently shows a notice to defendant of plaintiff's election to rescind the contract, and an offer to return the note and mortgage.
4. No formal *tender* of the thing sold is necessary when the vendor refuses to assent to a rescission of the sale and repay the purchase money.
5. The omission of the complaint to state that the plaintiff is ready and willing to restore the note and mortgage to defendant, does not render it liable to a demurrer *ore tenus*; but plaintiff will be required to prove on the trial that he is in a condition to make such restoration, and should make it then and there.

APPEAL from the Circuit Court for *Fond du Lac* County.

The case is thus stated by Mr. Justice TAYLOR:

"This action was brought to recover the money paid to de

Potter vs. Taggart.

fendant for a note and mortgage purchased from him by the plaintiff, upon the ground of fraud and misrepresentation on defendant's part, in the sale thereof. The complaint alleges that the defendant was the owner and holder of a certain note, and a mortgage which was given to secure the payment thereof, setting out the note, which is dated May 22, 1873, and is for \$500, payable five years from its date, with interest payable annually at ten per cent. after July 1, 1873. The mortgage was upon a certain lot of land therein described, containing 62 1-10 acres, situate in Winnebago county. The note and mortgage were made by one J. W. Sanders. The complaint then alleges that the mortgagor, on June 9, 1873, sold to one H. B. Jackson, twenty-two acres of said mortgaged premises; that the defendant, for the consideration of \$125 then paid to him, released said twenty-two acres from the lien of said mortgage; and that the \$125 so received by the defendant was indorsed by him upon said note of \$500; that afterwards, and on April 20, 1877, at the request of the defendant, the plaintiff bargained with defendant for the purchase of said note and mortgage, and purchased the same from him for the sum of \$403.91. It then alleges that at the time of such purchase of said note and mortgage, plaintiff had no knowledge of the dealings between Sanders and Jackson, nor of the execution by defendant of said release or satisfaction of said mortgage upon that portion of said land so conveyed by Sanders to Jackson; that, being so possessed of said note and mortgage, on said 20th day of April, 1877, defendant 'wrongfully and injuriously contriving and intending to defraud and injure the plaintiff, falsely, fraudulently and deceitfully pretended and represented to plaintiff, and by fraud induced plaintiff to believe and suppose, that said note, so reduced in amount by said credit or indorsement upon it, was secured by said mortgage upon the whole of the land described in said mortgage; and wrongfully and fraudulently concealed from plaintiff the fact that he, the said defendant, had released a large part or

Potter vs. Taggart.

portion of the land described in said mortgage;' that, not knowing that defendant had executed said release or satisfaction of said mortgage upon that portion of the land conveyed by Sanders to Jackson, and relying upon the representations of defendant that all the land described in the mortgage was a security for the unpaid balance on said note, plaintiff was thereby induced to purchase said note and mortgage of the defendant, and then and there paid to him \$403.91 as and for the price and value of said note and mortgage; that because of the execution of said release or satisfaction as to a portion of the land 'said mortgage became thereby and was of much less value, and said note became and was of much less value, than they would have been had not said release been executed as aforesaid; and that said note and mortgage thereby became of little value to the plaintiff, and thereby the plaintiff has lost all the benefit and advantage which he might and would have derived from the purchase as aforesaid of said note and mortgage, had said representation been true, and as represented to him by the said defendant;' and that 'as soon as plaintiff ascertained that the said representations were not true, to wit, on or about the 20th day of September, 1879, he went to the defendant for the purpose of demanding of him a return of the \$403.91, paid by plaintiff to defendant as aforesaid, and to return to him, the said defendant said note and mortgage; but the defendant then and there refused to do anything in regard to the matter, and then and there refused, and still refuses, to return to plaintiff said sum, or any part thereof.' Judgment is therefor demanded against the defendant for the said sum of \$403.91, with interest from the 20th day of April, 1877, etc.

"To this complaint the defendant answered a general denial.

"The case was placed upon the calendar after due notice of trial, and was called for trial in its order upon the calendar. Upon the trial, the respondent objected to the introduction of any evidence in the case, on the ground that the complaint did not state facts sufficient to constitute a cause of action;

Potter vs. Taggart.

the objection was sustained, and judgment entered dismissing the complaint with costs; and plaintiff appealed from the judgment."

For the appellant there was a brief by *W. W. D. Turner*, his attorney, and *Geo. E. Sutherland*, of counsel, and oral argument by *Mr. Sutherland*.

Chas. W. Felker, for the respondent.

TAYLOR, J. It will be seen by the complaint that the appellant seeks to rescind a contract of purchase, and recover back from the respondent the purchase money of the note and mortgage, basing his rescission upon the ground of the alleged fraudulent representations and concealment on the part of the respondent of the fact that twenty-two acres of the land described in the mortgage had been released by the respondent before the sale thereof to the appellant.

The learned counsel for the respondent insists — *first*, that the complaint does not show that the appellant was injured by the alleged fraudulent representations and concealment of the respondent, and so fails to state any reason for a rescission of the contract; and *second*, that it fails to show that he returned or offered to return the note and mortgage to the respondent before the action was commenced, and in that respect fails to show him in a position to demand his purchase money back.

We are inclined to hold that after answer, upon an objection taken for the first time to its sufficiency, the complaint is sufficient in both respects. In the case of *Hazleton v. Union Bank*, 32 Wis., 34-43, Justice LEXON, in delivering the opinion, says: "The rule is well settled that a greater latitude of presumption may be indulged in to sustain a complaint where the objection that it does not state a cause of action is taken for the first time at the trial, and after an issue of fact has been taken upon it by answer, than where the same objection is taken by demurrer." The same rule was stated in *Teetshorn v. Hull*, 30 Wis., 162-167; *Hamlin v. Haight*, 32 Wis., 238-242; *Luth-*

Potter vs. Taggart.

eran Evangelical Church v. Gristgau, 34 Wis., 328; *Johnson v. Ashland Lumber Co.*, 45 Wis., 119; *Johannes v. Youngs*, id., 448; *Wittmann v. Watry*, id., 493. Under the rule established by the cases cited, we think the complaint sufficiently alleges that the respondent was guilty of making either a fraudulent representation or a fraudulent concealment of the fact that a part of the property described in the mortgage had been released before the date of the sale, and that such fraud was injurious to the appellant.

The allegations of the complaint show, as a matter of fact, that the mortgage was of less value as a security after the release of the twenty-two acres than it was before such release. It alleges that the twenty-two acres were in fact sold for \$125; and it is a fair inference that the mortgage as a security was at least worth as much less as the value of the land sold and released. But in addition to this, there is a positive allegation in the complaint that, by reason of the release of the twenty-two acres, "the mortgage became thereby and was of much less value, and that said note became and was of less value, than they would have been had not said release been executed, and that said note and mortgage thereby became of little value to the plaintiff, and thereby the plaintiff has lost all the benefit and advantage which he might and would have derived from the purchase of said note and mortgage."

If it be necessary, in order to entitle a party who has been induced to make a purchase of a note and mortgage or any other property by the false and fraudulent representations of his vendor, to show that he has been damaged in fact by such false representations, in order to entitle him to rescind the contract and recover back the purchase money, it would seem that the allegations above quoted from the complaint clearly show such damage. Certainly, if his note and mortgage were still well secured, notwithstanding the release, then the plaintiff could not have truthfully made the statement "that he had lost all the benefit and advantage which he might and would

Potter vs. Taggart.

have derived from the purchase of said note and mortgage." The only legitimate benefit and advantage he could derive from the purchase of the note and mortgage would be to receive upon the same the amount secured thereby, with interest; and if, by reason of the release, he was unable to secure the payment of that amount, then he was damaged by such release. Upon this point, though the allegations are quite general, yet, under the rule above quoted, they are quite sufficient to show that the appellant has sustained damage by reason of the release of the twenty-two acres before his purchase, and that by reason of such release he would be unable to collect the amount due upon the same.

Upon the second point we think the allegations of the complaint are sufficient. The rule as to the rescission of contracts, stated by Leake in his Digest of the Law of Contracts, is as follows: "The fact that the contract was induced by fraud gives the party defrauded the right, on discovering the fraud, to elect whether he will continue to treat the contract as binding, or avoid it; but the contract continues valid until he has determined his election by avoiding it." "He must determine his election to rescind by express words to that effect, or by some unequivocal act, under circumstances which render such words or act binding." The complaint in this action states that, as soon as the appellant ascertained that he had been defrauded in the purchase of the note and mortgage, he immediately went to the respondent "for the purpose of demanding of him a return of the \$403.91 so paid by the appellant to the respondent, and to return to him the said note and mortgage; but the respondent then and there refused to do anything in regard to the matter, and then and there refused, and still does refuse, to return to plaintiff said sum or any part thereof." It is true, this allegation does not state in express words that the appellant offered to return the note and mortgage to the respondent, but we think it is fairly to be inferred from the language used that he did make such

Potter vs. Taggart.

offer. He says he went to the respondent for the purpose of making such offer and to demand his money back, and that the respondent refused to do anything in regard to the matter, and "then and there refused, and still does refuse, to return the money or any part thereof." The refusal of the respondent to do anything about the matter, and to return the money or any part thereof, clearly implies that he was requested by the appellant to do something about it and to return the money.

In order to rescind a contract by a purchaser, when a ground for rescission exists, it is not necessary to make any formal tender of the property held by the purchaser; it is sufficient to offer to make return of the same (see *Van Trott v. Wiese*, 36 Wis., 439-448; *Mann v. Stowell*, 3 Pin., 220); and if the vendor refuses to receive the property back and return the purchase money, or do anything except to keep what he has, no formal tender of the property is necessary. The right of the vendor to have the property formally tendered is waived by his refusal to accept it in advance.

In *Wright v. Young*, 6 Wis., 127, this court say: "In this case the appellant has from the outset resisted the performance of the contract, and insisted that it was not binding on him. Any tender to him, while occupying this ground of defense, would have been an idle ceremony." So, in the case at bar, the respondent insists that the appellant has no right to rescind the contract, and refuses to return the purchase money, or any part thereof. By taking that position he relieves the appellant from making any formal tender of the note and mortgage. The appellant has done all that is necessary to maintain his action when he shows that he has offered to return what he had received upon the contract, and that the respondent has refused to receive it and return the purchase money. The following cases hold the same rule: *Racine Co. Bank v. Keep*, 13 Wis., 209-214; *Corbitt v. Stonemetz*, 15 Wis., 170-172;

Potter vs. Taggart.

McWilliams v. Brookens, 39 Wis., 334; *Cunningham v. Brown*, 44 Wis., 72.

If the vendor in such case is ready to rescind on his part, then it becomes necessary for the purchaser to tender and return to the vendor all he has received under the contract. When the vendor refuses to do anything in the matter, and the vendee brings his action to recover the purchase price, he must prove on the trial that he is in a condition to restore to the vendor what he received upon the contract, and should make restoration upon the trial. If the purchaser of a horse seeks to rescind the contract for the fraud of the vendor, he must, before suit brought, notify the vendor that he elects to rescind the contract, and offer to return the horse; but if the vendor refuses to do anything about the matter, he must keep the horse for the vendor, and subject to his order, and must, upon the trial, show that the horse is subject to the order of the vendor. The complaint would have been more formal if it had stated that the appellant was then ready and willing to return the note and mortgage to the respondent; but we do not think this statement so essential as to make the complaint the subject of a demurrer *ore tenus* on the trial.

The plaintiff's right to bring an action to recover back the purchase money which has been wrongfully obtained from him on a sale of property which has been delivered to him, is perfect when he has, upon the discovery of the fraud, promptly notified the vendor that he elects to rescind the contract and offers to return the property purchased; and possibly, when the vendor does not in terms refuse to recognize his right to have the contract rescinded, he must make a formal tender of the property received by him; and when the vendor refuses absolutely to refund the purchase money, or absolutely refuses to recognize the vendee's right to rescind, no formal tender is necessary, and notice of his determination to rescind the contract on account of the fraud, and an offer to return the prop-

Potter vs. Taggart.

erty purchased, are sufficient to enable him to maintain his action. All the rights of the vendor in such case can be preserved upon the trial by requiring the plaintiff to show that he is able and willing to return the property purchased, and he may be required before judgment to place the property where the defendant can obtain possession of the same. See *Clough v. London & N. W. Railway, L. R.*, 7 Exch., 26; *Nellis v. Bradley*, 1 Sandf., 560; *Coghill v. Boring*, 15 Cal., 213.

Under the decisions of this court the plaintiff might have brought an action in form for money had and received by the defendant for the plaintiff's use, without setting out any of the facts upon which his right of action depended; but upon the trial he would be compelled to show the fraud of the defendant in the sale of the note and mortgage, and his offer to return the note and mortgage before action brought, in order to entitle him to judgment. See *Mann v. Stowell*, 3 Pin., 220; *Simmons v. Putnam*, 11 Wis., 193; *Grannis v. Hooker*, 29 Wis., 65. We think if the appellant proves the allegations of his complaint, when construed liberally in accordance with the rule above stated, he would be entitled to recover the purchase money paid for the note and mortgage, for the reason that it was obtained by fraud, which was injurious to the appellant, and that the rights of the respondent can be preserved by requiring the appellant to bring the note and mortgage into court on the trial and execute an assignment thereof to the respondent.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

Lyle vs. Dellinger.

LYLE VS. DELLINGER.

February 7 — March 14, 1883.

Judgment on verdict.

The judgment of the circuit court affirming the judgment of a justice's court (where there was no trial *de novo*) affirmed here on the ground that there was evidence to sustain it.

APPEAL from the Circuit Court for *Fond du Lac* County.

The case is thus stated by Mr. Justice CASSODAY:

"The undisputed evidence shows that the defendant, by an instrument in writing, appointed the plaintiff as his agent for the sale and renting of a house and lot here in question, and also of another house and lot, at prices named, but expressly stipulated that in case the defendant found his own customer the plaintiff should have no fee. The renting was effected through John Pearson and Mr. Bishop, father of Mrs. Carpenter, both acting for and in her behalf. During the negotiation for renting, Pearson and Bishop each inquired the price, and were informed by the plaintiff that it was \$500, and the plaintiff finally offered it to them for Mrs. Carpenter for \$450. Subsequently the house and lot were purchased by William E. Field for \$400, in behalf of Mrs. Carpenter. This action was brought in justice's court to recover \$13.50 commissions on such sale, but the judgment was for the defendant. From that judgment the plaintiff appealed to the municipal court of Ripon, from which the cause was removed to the circuit court for Fond du Lac county, where the judgment of the justice's court was affirmed. From that judgment this appeal is brought."

For the appellant there was a brief by *W. W. D. Turner*, his attorney, with *Geo. E. Sutherland*, of counsel, and oral argument by *Mr. Sutherland*.

The cause was submitted for the respondent on the brief of *E. L. Runals*.

Durkee vs. Felton, imp.

CASSODAY, J. There is evidence tending to show that after the plaintiff, as agent of the defendant, had rented the house and lot to Mrs. Carpenter, William E. Field, acting for her, purchased the same of the defendant, personally, and that the plaintiff had nothing to do with such purchase, nor any of the negotiations leading to the same. This testimony, and the express written stipulation that the plaintiff should "have no fee" in case the defendant found his "own customer," seem to be sufficient to sustain the judgment of the circuit court; and the same is therefore affirmed.

By the Court.—Judgment affirmed.

DURKEE vs. FELTON, imp.

February 7—March 14, 1882.

EJECTMENT. (1) *Proof of ouster by tenant in common.* (2) *Amendment of pleading at trial. Withdrawal of admission.* (3) *Record evidence construed.*

1. In ejectment, proof that defendant claimed to have a deed of the premises, and assumed a right to lease them and to collect the rents and retain them to his own use, at least *tends* to show an *ouster* of the plaintiff.
2. Plaintiff sued to recover an *undivided* third part of certain premises, by right of dower. The answer alleged that parcels *x* and *y* of the premises had been *set off* to plaintiff as her dower. After the evidence was closed, defendant was permitted to amend so as to allege that only parcel *x* had been set off as dower, and parcel *y* as homestead (plaintiff's homestead right being lost by remarriage); and plaintiff was also allowed to amend her complaint so as to claim a life estate in the whole of parcels *x* and *y*, instead of in an undivided third of the whole premises. *Held*, that there was no error in allowing the amendment to the answer, and that, after such amendment, defendant was not bound by the admission in the original answer.
3. A certain report of commissioners appointed to admeasure plaintiff's dower, etc. (which was confirmed by the court), construed as an assignment of parcel *x* as dower, and of parcel *y* as homestead.

Durkee vs. Felton, imp.

APPEAL from the Circuit Court for *Fond du Lac* County.

In May, 1866, J. J. Lefevre died seized of a large part of block 3 in the village of Rosendale, Fond du Lac county, in this state; and he left surviving him his widow (who in 1872 married one Edward Durkee, and appears as plaintiff in this action under the name of *Hattie A. Durkee*), and two children, William Lefevre and a daughter, who appears as defendant in this action under the name of *Cora D. Felton*. In September, 1866, the widow filed her petition in the probate court of said county, stating that, at the time of his death, said J. J. Lefevre was seized of an estate in fee simple in the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of sec. 9 in the town of Springvale in Fond du Lac county; and asking to have her dower in said estate assigned. It appears that commissioners were thereupon appointed by said probate court for the purpose of assigning such dower; and they reported as follows: "We, the commissioners appointed, etc., for the purpose of partitioning and admeasuring and setting apart by metes and bounds the dower of Hattie A. Lefevre, the widow of the said J. J. Lefevre, deceased, do hereby make our report and returns to the said county court, containing a description of our said doings, to wit: one-third of the north side of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of sec. 9, town 15 north, of range 15 east, and described by stakes set on the east and west lines of said forty, said stakes setting 26 rods and 11 feet from the northwest corner and the northeast corner of said forty; also the homestead and home in the village of Rosendale in said county, in block 3, lots 20 and 21, and described as follows: commencing at the southeast corner of lot 20, 5 rods and 8 feet north, thence 7 rods and $6\frac{1}{2}$ feet west, thence south 5 rods and 8 feet, thence east 7 rods and $6\frac{1}{2}$ feet, to the place of beginning, making about one-quarter of an acre; also one-third of the orchard, described as follows: commencing at a point 7 rods and $6\frac{1}{2}$ feet west of the southeast corner of the said lot 20, running thence west 48 feet and 8 inches, thence north 5 rods and 8

Durkee vs. Felton, imp.

feet, thence east 48 feet and 8 inches, thence south 5 rods and 8 feet, to the place of beginning; also a piece of land in said block, on the east side of lots 22 and 25, commencing at the west line of lot 21 in said block, 5 rods and 8 feet from the south line of said lot, running thence north to the north line of said lot 25, thence west 3 rods, 9 feet and 11 inches, thence south 10 rods and 4 feet, thence east 3 rods, 9 feet and 11 inches, to the place of beginning, containing about thirty-eight rods and two feet." This report appears to have been confirmed by the probate court.

The parcel of land described in the foregoing report as "the homestead," being a tract in the southeast corner of said block 3, 7 rods $6\frac{1}{2}$ feet in length (from east to west) by 5 rods and 8 feet in breadth, will be herein designated as parcel A. The parcel described as "one-third of the orchard," and which immediately adjoins parcel A on the west, will be herein designated as parcel B. The last parcel of land described in the report as "on the east side of lots 22 and 25," will be herein designated as parcel C. Its south boundary is in large part identical with the north boundary of parcel B, but runs farther to the west.

The action was commenced February 19, 1877, against *Cora D. Felton* and two other persons. The complaint alleged that at the time of his death J. J. Lefevre was seized in fee simple of lands in the village of Rosendale, described as follows: "Commencing at the southeast corner of block 3 of said village plat, running thence north $5\frac{1}{2}$ rods, thence west 8 rods, thence north $10\frac{1}{2}$ rods, thence west 8 rods, thence south 16 rods, thence east 16 rods, to the place of beginning; also a strip three rods in width off the north side of lots 26 and 27 in said block 3." Besides the three-rod strip last mentioned, the tract here described includes the whole of parcels A, B and C above described, and also all of said block 3 lying west of parcels B and C, which contains apparently nearly one-half of an acre. The complaint further alleged that plaintiff was enti-

Durkee vs. Felton, imp.

tled to a life estate "in one undivided third part of said lands and premises, as her reasonable dower," and to the immediate possession thereof; and that the defendant was in possession of the said premises and unlawfully withheld the same from plaintiff, to her damage \$200; and judgment was demanded in accordance with these averments.

As a separate cause of action, the complaint alleged that the plaintiff was seized of an estate for life in parcels A, B and C above described; that she was entitled to the immediate possession of said lands, "the same being her legal, just and reasonable dower in the lands described in the first cause of action herein;" and that the defendants were in possession of said lands and unlawfully withheld the same from plaintiff, to her damage \$200; and judgment was demanded in accordance with these averments.

The answer of *Cora D. Felton* to the first cause of action, after averments to show that William Lefevre was a necessary party defendant thereto, alleged, in substance, that parcels A, B and C above described had been duly assigned to the plaintiff in November, 1866, by the proper county court, as her dower in the premises described in said first cause of action; that such assignment had been recorded in the office of the register of deeds of the proper county, and had never been reversed on appeal; and that said defendant had never been in possession of any part of said dower premises, nor had she withheld possession of any part thereof from the plaintiff. For a further answer, by way of counterclaim, it was alleged that the defendant, in order to protect her interests as owner in fee simple in reversion of one undivided half of the lands described in plaintiff's first cause of action, had been compelled to pay \$100 of taxes on the one-third part of said land which plaintiff claimed was her dower interest, plaintiff having neglected to pay such taxes. It is also alleged that plaintiff, as widow of J. J. Lefevre, was entitled upon his death to a life interest in the whole of parcel A above described, which

Durkee vs. Felton, imp.

was the homestead of said Lefevre until his death; that plaintiff possessed the same as her homestead from said Lefevre's death until about February 1, 1872, but neglected to pay any of the taxes assessed thereon; and that, in order to protect her reversionary interest in said parcel A, said defendant had been obliged to pay taxes to the amount of \$100.

In answer to the second cause of action stated in the complaint, said defendant, after averments showing that William Lefevre was a necessary party defendant thereto, denied that she was in possession of the premises at the commencement of the action, or had withheld possession of any part thereof from the plaintiff. As to parcel A above described, she alleged that plaintiff had not had any title thereto or right of possession thereof since February, 1872, by reason of her marriage in or about the month of January of that year to Edward Durkee. The answer further set up a counterclaim for taxes paid by defendant upon plaintiff's dower interest in the land described in the second cause of action, and also a claim for permanent and valuable improvements put upon said land by said defendant in good faith.

In April, 1880, the answer was amended so as to allege that *Cora D. Felton* was a married woman, the wife of Albert N. Felton, and to deny generally all the allegations of both causes of action stated in the complaint. The complaint was then amended by making Albert N. Fenton and William B. Lefevre defendants, and charging all the defendants with a joint unlawful possession, etc. It does not appear that the new defendants filed any answer.

On the trial of the cause in November, 1881, the plaintiff, being required on motion to elect under which count of the complaint she would proceed, elected to proceed under the first. After the plaintiff had introduced her evidence, the defendant *Mrs. Felton* moved for a nonsuit on the ground that no ouster of the plaintiff had been shown; but the motion was denied. Said defendant was then permitted, against plaintiff's objection, to amend her answer to the first cause of

Durkee vs. Felton, imp.

action so as to make it allege, in substance, 1. That by the proceedings in the probate court in 1866, parcels B and C above described were assigned as plaintiff's dower in all of the premises mentioned in the first count of the complaint, except parcel A. 2. That parcel A was the homestead of J. J. Lefevre at the time of his death, and that plaintiff was married in 1872, to Durkee.

Said defendant then put in evidence the records relied upon as showing an assignment of dower, etc., to the plaintiff in 1866. Plaintiff objected to the evidence upon the ground that there was "an express admission that this dower had been regularly set apart, and it was not competent now to controvert that admission by introducing this proof." The objection was overruled. Said defendant then offered in evidence the record of a sheriff's deed, dated November 10, 1873, conveying to one L. E. Reed nearly the whole of the land described in the first count of the complaint, except parcel A (the homestead); and also the record of a warranty deed of the same premises from said Reed to *Mrs. Felton*, dated November 19, 1873. Said sheriff's deed was based upon the foreclosure of a tax certificate; and, upon plaintiff's objection that she was not a party to such foreclosure, the evidence was rejected. Various tax certificates and receipts were then put in evidence. The plaintiff was then permitted, against defendant's objection, to amend her complaint so as to allege that she was seized of an estate for life in, and was entitled to the immediate possession of, the whole of parcels A, B and C, above described, "the same being her legal, just and reasonable dower" in the lands of J. J. Lefevre, deceased, previously described in the complaint, and that the same had been duly admeasured and set apart to her as dower. The amended complaint also increased the demand for damages to \$600. *Mrs. Felton* then asked leave to amend her answer by substituting for it the answer to the second cause of action originally set forth in the complaint; but the motion was denied.

The court instructed the jury that it appeared from the evi-

Durkee vs. Felton, imp.

dence that at the commencement of the action the plaintiff had an estate for life in the premises described in the last amended complaint [i. e., in parcels A, B and C], and that she was entitled to the possession thereof at that time, and still continued to be so entitled; that if they should find that *Mrs. Felton*, at the commencement of the action, unlawfully withheld possession of such premises from the plaintiff, then plaintiff was entitled to recover of said defendant the value of the use and occupation of said premises during such time as possession thereof was so withheld, not exceeding six years immediately preceding the commencement of the action, and down to the time of the trial, less any sum paid by said defendant as taxes on said premises. A verdict was rendered for the plaintiff in accordance with these instructions; a new trial was refused; and the defendant *Mrs. Felton* appealed from the judgment.

For the appellant there was a brief by *C. L. Frederick*, her attorney, with *T. W. Spence*, of counsel, and oral argument by *Mr. Spence*.

Geo. E. Sutherland, for the respondent.

COLE, C. J. There certainly was no error in the ruling of the court below refusing to nonsuit because there was no sufficient proof of ouster or of a denial of the plaintiff's rights in the premises. The defendant claimed to have a deed of the property; she assumed the right to lease it, and to collect and retain the rents to her own use. These acts surely amounted to a complete denial of the plaintiff's rights in the property, or, at least, were acts from which a jury might infer an intent on the defendant's part to exclude the plaintiff from all enjoyment of the premises. The record in this case is quite confusing, and there are many typographical errors in the printed case, which are misleading. If we fall into any mistake as to what was done on the trial, the blame should be that of counsel for presenting a case in this manner, rather than rest with us.

As we understand the case, the plaintiff was compelled on

Durkee vs. Felton, imp.

the trial to elect, and did elect, to proceed for the interest stated in the first cause of action in the complaint. That was for an undivided third part of the premises described. The answer of the defendant was to both causes of action. To establish her right to recover, the plaintiff sought to avail herself of the admissions in the answer that there had been an admeasurement of the dower by commissioners appointed by the county court sitting in probate, and that the premises had been set off to the plaintiff as and for dower. As a matter of course, this was a different interest from that originally claimed in the complaint. While the motion for a nonsuit was pending, the defendant asked and had leave to so amend her answer as to make it read, "By such admeasurement of dower and homestead right, there was set off to the plaintiff, as her full dower and homestead right in said premises, all the premises described as follows," etc. When the report of the commissioners was offered in evidence by the defendant, the plaintiff objected to the same because it was incompetent and inadmissible under the pleadings, there being an express admission in the answer that the premises had been regularly set apart to the plaintiff as dower, and that this admission could not be countervailed by proof. But finally the plaintiff amended her complaint, and had a verdict for the premises as specifically described in the defendant's original answer.

Now it is insisted that the defendant was bound by the admissions in her original answer to the effect that the plaintiff was entitled to the entire premises as dower which had been assigned to her by the commissioners appointed for that purpose. But the court did allow the answer to be amended in respect to the premises which were assigned as dower. It seems to us a very plain proposition that it was entirely competent for the court to allow that amendment. There is no more reason for holding that the defendant was immutably bound by the admissions in her answer as to what was assigned as dower, than there is for saying that the plaintiff could only recover that precise interest in the premises which she sued

Durkee vs. Felton, imp.

for. But in fact she was permitted to amend her complaint so as to recover an entirely different interest. Why should the amendment to the pleading be allowed in the one case and refused in the other? It is said the defendant claimed the bald, naked right to amend her answer on the trial, after the close of the plaintiff's case, by denying a material fact which had stood admitted in the answer for nearly five years. But did not the plaintiff claim and exercise the same right at the close of the case? Where is the consistency in saying that the amendment to the answer came too late, and still insisting that the plaintiff's amendment of her complaint was right and proper under the circumstances? Astute counsel may see reasons for a distinction in the cases, but to our minds they seem to stand on the same grounds. We therefore hold that the court properly allowed the answer to be amended in respect to the dower interest.

The next inquiry is as to what effect should be given the report of the commissioners which was offered in evidence, and the order of the probate court approving the same. Does that report assign all the premises therein described as dower proper, or does it merely assign dower in a part and a homestead right in the residue? We have no doubt but the latter is the correct construction to be given the report. At the time these proceedings were taken, the plaintiff, as widow, was entitled to the homestead of which her husband died seized. She made application to the probate court that her dower be assigned to her. The guardian of the minor children filed a written consent that commissioners be appointed to set off her dower, and also to "set off the homestead and house to said widow." Doubtless the commissioners acted on this consent of the guardian, and intended to make their report conform to it. They proceeded and set aside by metes and bounds certain tracts of land as her dower. They also set aside another tract which was particularly described as a homestead. What was intended to be assigned as dower proper, and what as a home-

stead right, might have been more fully set forth; but there is no difficulty in getting at the real meaning of the report. The tract which is described as being the homestead, "making about a quarter of an acre," was to remain a homestead,—should be treated as such,—which was to be enjoyed by the plaintiff so long as she remained a widow. And it would be doing violence to the language of the report, when read in the light of surrounding circumstances, as well as a perversion of the facts of the case, to hold that the homestead was set off to the plaintiff as dower, or that the dower assigned includes such homestead. Upon this point we fully agree with the defendant's counsel that nothing of the kind was attempted by the commissioners, and that the true construction of their report is that certain tracts are set aside as dower proper, and then the homestead proper is described for the purpose of fixing its limits. This is our understanding of the report of the commissioners. This view works a reversal of the judgment; for it appears that the plaintiff has married again. Of course she has lost her homestead rights. She is now only entitled to her dower in what was the homestead property. The judgment gives her possession of that entire property for her natural life, as being a part of her just and reasonable dower in the lands of which her first husband died seized. The learned circuit court ruled that, as it appeared from the evidence that the plaintiff had a life estate in this homestead property, as well as in the other premises described in the last amended complaint, she was entitled to recover that interest in this action. That ruling was doubtless founded upon the report of the commissioners to which we have referred. But as we deem that construction erroneous, there must be a new trial.

By the Court.—The judgment of the circuit court is reversed, and a new trial ordered.

TAYLOR, J., took no part.

Sheboygan County vs. The City of Sheboygan.

SHEBOYGAN COUNTY VS. THE CITY OF SHEBOYGAN.

February 7 — March 14, 1882.

STATUTE CONSTRUED. "*Unpaid taxes*" include unpaid special assessments for street improvements.

1. The term "unpaid taxes," in the statute regulating settlements between town and county treasurers (sec. 1114, R. S.), includes unpaid special assessments for street improvements; and that statute is applicable to the defendant city, under its charter (Laws of 1877, ch. 29, sections 10, 14), and R. S., sec. 4986.
2. Accordingly the defendant city is entitled to be credited by the county treasurer with the amount of special assessments for street grading, duly returned delinquent by the city treasurer. *Finney v. Oshkosh*, 20 Wis., 209, and *Jenks v. Racine*, 50 id., 318, distinguished.

APPEAL from the Circuit Court for *Sheboygan* County.

The complaint alleged that, in the taxes imposed upon certain property in the defendant city, in 1878, returned delinquent by the city to the county treasurer, and credited to the former, there was included a special assessment for grading, charged against certain lots, amounting to \$362.60; that this amount was charged back to the city by order of the county board of supervisors, and apportioned to the city in 1880; and that the city refused to pay the same. Judgment for that sum and for certain collection fees, was demanded. A general demurrer to the complaint was sustained; and plaintiff appealed from the order.

J. Q. Adams, for appellant, contended, among other things, that sec. 1114, R. S., is not applicable, and is inconsistent with the charter of the defendant city, except so far as it may apply to the general taxes. It provides that, upon the return of the delinquent list to the county treasurer, "all taxes so returned as delinquent shall belong to the county, and be collected, with the interest and charges thereon, for its use." But sec. 9, ch. XIII of the charter (ch. 254, P. & L. Laws of 1868),

Sheboygan County vs. The City of Sheboygan.

provides that the amount due on any grading certificate shall be collected for the use and benefit of the holder of such certificate, that is, for the use and benefit of the contractor. If, therefore, the provisions of sec. 1114, R. S., were applied to this case, it would allow the city to take property that it did not and could not own, and convey it to the county in extinguishment of its own obligation to the county; and the county would acquire a good title to the property so conveyed. Such construction of the statute would bring it in direct conflict with sec. 13, art. I of the constitution. *Finney v. Oshkosh*, 18 Wis., 209; *Jenks v. Racine*, 50 Wis., 318.

Conrad Krez, for the respondent argued, among other things, that it was the duty of the county treasurer to give to the city treasurer credit for the amount in question, and quoted the opinion of the circuit judge in making his decision upon the demurrer, as follows:

"The demurrer presents the question, whether the treasurer of the city is entitled to credit for unpaid special assessments made under subch. XIII of ch. 254, P. & L. Laws of 1868, on his return of delinquent taxes to the county treasurer. Sec. 9 of said subch. XIII provides that if the amounts of such assessments are not paid, the same shall be assessed upon the lots and entered upon the tax roll and collected for the use and benefit of the holder of such certificate, as other taxes are collected by virtue of that act or by the laws of this state, and further provides that in no event shall the city be liable for the payment thereof.

"The special assessment is made a lien upon the land by the assessment and entry upon the tax roll. The only provisions in the charter relating to the collection of such assessments are contained in sec. 6, ch. 29, Laws of 1877, which takes the place of subch. XI of ch. 254, P. & L. Laws of 1868.

"Sec. 10, ch. 29 of 1877, in relation to special assessments, requires that the 'treasurer shall collect and do all other acts in relation thereto in the same manner as if the amount thereof

Sheboygan County vs. The City of Sheboygan.

were a general tax.' Sec. 14 provides that 'if any taxes mentioned in said tax roll . . . shall remain unpaid either on real estate or personal estate, and he shall be unable to collect the same, he shall make out a statement of the taxes so remaining unpaid, . . . [which] with the affidavit attached . . . shall be called the delinquent list, and it shall be his duty to deliver such delinquent list to the treasurer of the county . . . and pay over to said treasurer all moneys . . . in the same manner as required by law of town treasurers.' The tax roll includes the special assessments, and if unpaid must be included in the delinquent list returned to the county treasurer. It is manifest from the various provisions of the charter cited, that such assessments are to be collected or returned as other taxes, and the duty of the city treasurer in relation thereto is the same.

"The supreme court of this state, in *Dalrymple v. The City of Milwaukee*, 53 Wis., 178, hold that assessments of the character in question are taxes, *expressly* overruling the New York cases to the contrary. See also *May v. Holdridge*, 23 Wis., 93.

"Therefore the charter of the city, if it does not in terms expressly incorporate the general laws of the state in reference to the return of the delinquent taxes and the credit to be given therefor, contains nothing inconsistent therewith; and when not inconsistent with their charters the Revised Statutes of 1878 apply to and are in force in all of the cities of the state. Sec. 4986. The provisions of ch. 49, R. S. 1878, on taxation, prescribe the duty of the defendant's treasurer, for it enacts that the provisions thereof relative to towns and town treasurers shall apply to cities and the treasurers thereof when the same are applicable, unless otherwise provided. Sec. 1151.

"Sec. 1112 prescribes what taxes shall be returned as delinquent (commencing substantially with the language used in the beginning of sec. 14, ch. 29 of 1877); and sec. 1114 pro-

Sheboygan County vs. The City of Sheboygan.

vides 'that all taxes so returned as delinquent shall belong to the county and be collected for its use,' the treasurer to be credited with the amount of unpaid taxes.

"The city by the return of its treasurer having transferred to the county the duty under the statute of enforcing payment of delinquent taxes on lands, also passes to the county all interest in such taxes when collected, or interest in the land when sold for non-payment of the taxes, and should be credited with the amount of such taxes, paying over the balance only to the county. *Winchester v. Tozer*, 24 Wis., 312; *Wolff v. Stoddard*, 25 Wis., 503. See also, upon construction of the city charter, *State ex rel. Saar v. Hundhausen*, 26 Wis., 432.

"By sec. 1114 it is expressly provided that such delinquent taxes shall belong to the county and be collected for its use; and such section is applicable to cities when not otherwise provided by their charters, and it is not inconsistent with any part of the defendant's charter. While sec. 9 of subch. XIII, ch. 254, P. & L. Laws of 1868, makes it incumbent upon the city to collect special assessments for the benefit of the holder of the certificates, it does not impose that duty upon the county; and the latter cannot be made the trustee of the holder without express provision of law. There is no law to that effect. *Finney v. Oshkosh*, 18 Wis., 209, is not applicable; for, by the charter of the city of Oshkosh in force at that time, the city treasurer did not make a return of delinquent taxes to the county treasurer, but the city treasurer was authorized to make sale of lands for delinquent taxes and bid in for the city lands not bid off by other parties. The city in that case held the certificate on tax sale, whereas now the same is owned and held by the county. Sec. 17, subch. XI, ch. 254, P. & L. Laws of 1868, is no longer in force, having been repealed by sec. 6, ch. 29, Laws of 1877. The last named section provides as follows: 'The subdivision of said chapter 254, designated therein as chapter eleven, is hereby amended and revised to

Sheboygan County vs. The City of Sheboygan.

read as follows: ' omitting sec. 17. Where a later statute revises the subject matter of a former statute, it becomes a substitute for the former, and works a repeal. *State v. Campbell*, 44 Wis., 529, and cases cited; *Fire Department of Oshkosh v. Tuttle*, 48 Wis., 91.

"Sec. 6, ch. 29 of 1877, is a substitute for subch. XI, ch. 254, P. & L. Laws of 1868; and there remains no power in the county treasurer to return certificates to the city treasurer, as decided in *Jenks v. Racine*, 50 Wis., 318, under a provision similar to sec. 17.

"So far as appears from the complaint, no proper ground is shown for charging back to the city the taxes therein specified; and for aught that is alleged, the county may have sold the lands for the delinquent taxes, received the moneys and suffered no damage.

"If for any causes mentioned in the statute the taxes are declared illegal by the courts, or by resolution of the county board, they may be charged back to the city; but nothing of that kind is averred or suggested in the complaint.

"While the burden of the delinquent list is thrown upon the county, it has the power to reimburse itself by the sale of the delinquent lands; and if the taxes are found to be illegal, its interests are protected by the right, upon refunding the money paid to the holder of the tax certificate, to charge the amount back to the town or city which was allowed credit therefor. After careful examination, I am of the opinion that the demurrer to the complaint must be sustained."

Lyon, J. It is not alleged or claimed that the special assessment or tax was not legally levied, or that it is not a valid charge against the lots upon which it was imposed. The action is based solely upon the proposition that in his settlement with the city treasurer the county treasurer should not have allowed the amount of the grading tax or assessment, and therefore that the county had a valid claim against the city

Sheboygan County vs. The City of Sheboygan.

for the sum thus improperly credited to the city. The learned circuit judge held that the city was entitled to the credit, and hence sustained the demurrer to the complaint. We are satisfied that the ruling is correct, and the grounds of our opinion will be briefly stated.

The law governing the settlement between the two treasurers is contained in the Revised Statutes, p. 360, sec. 1114. This is made perfectly clear by the provisions of the charter of the defendant city, contained in Laws of 1877, ch. 29, secs. 10 and 14, and of section 4986, R. S. Section 1114 provides that the town treasurer (or, as applied to this case, the city treasurer) shall be credited by the county treasurer with the amount of unpaid taxes returned by him, and that from thenceforth the same shall belong to the county. No discrimination is made between different kinds of taxes, or the different purposes for which they are imposed. The return may include state, county, town or city, ward, school or road taxes, or any special assessment whatever, authorized by law. These are not separately returned, but all unpaid taxes of every description on a given parcel of land are massed, and the aggregate amount of all is alone stated in the delinquent return. Section 1113.

If the return of the city treasurer, in the present case, was made in strict conformity with the statute, it does not show that it included any special assessment. To ascertain that fact, and the amount of such assessment, the county treasurer would be compelled to search the city records.

The principle of the statute is, that the county shall assume all delinquent taxes of every nature which have been legally levied in the several towns of the county, and in those municipalities therein which, like the defendant city, are under the general statute; and the county reimburses itself out of the proceeds of the sales for such delinquent taxes, or out of the lands sold, in case the county is the purchaser. The city treasurer retained in his hands, out of the taxes collected by him,

Sheboygan County vs. The City of Sheboygan.

the amount of the grading tax, and the holder of the grading certificate was entitled to be paid that amount by the city treasurer as soon as the county treasurer gave him the proper credit. The cases relied upon by counsel to sustain the opposite view are *Finney v. Oshkosh*, 18 Wis., 209, and *Jenks v. Racine*, 50 Wis., 318; but they do not support his position. In *Finney v. Oshkosh* the delinquent lots were not returned to the county treasurer, but under the charter of that city were sold by the city treasurer for the non-payment of the grading assessment. The city was the purchaser at the sale, and held the certificate when the action was commenced.

In *Jenks v. Racine* the lots upon which the assessment was made were returned delinquent for that and other taxes, and were sold by the county treasurer, and bid in by the county. The charter of Racine contained a provision giving the county treasurer the option to pay the city "either in cash or in certificates of sale of the lots or parcels of land returned as delinquent." He chose the latter course, and delivered to the city treasurer the certificates of sale. The city still held the certificates when the action was brought. The original charter of Sheboygan contained the same provision. P. & L. Laws of 1868, ch. 254, subch. XI, sec. 17. But this provision was repealed by chapter 29, Laws of 1877, secs. 6, 11 and 14, and delinquent special assessments in that city come under the general statutes. In the above cases the respective cities were held not liable for the grading assessments because the same had not been paid. The distinction between these cases and the present case, and their inapplicability thereto, is perfectly obvious.

We have used the terms "assessment" and "tax" interchangeably, for they are so employed in the statutes which rule this case. Within the meaning of those statutes, a special assessment for the cost of grading is a tax. *Dalrymple v. Milwaukee*, 53 Wis., 178.

By the Court.—The order of the circuit court sustaining the demurrer to the complaint is affirmed.

Varney vs. Varney.

VARNEY VS. VARNEY.

February 7 — March 14, 1882.

DIVORCE. *Parties defendant to divorce suit.*

In a divorce suit by the wife, an order refusing to allow an amendment of the complaint making a third person a defendant on the ground that the principal defendant had conveyed to him a part of his real estate with intent on the part of both to defraud plaintiff of a proper provision for her support, etc., is affirmed because it is not shown that there was any intention to prejudice plaintiff's rights, or that they will be prejudiced, in fact, by the conveyance. *Damon v. Damon*, 28 Wis., 510, distinguished.

APPEAL from the Circuit Court for *Fond du Lac* County.

The plaintiff appealed from an order which is described in the opinion.

For the appellant there was a brief by *Spence & Hiner*, and oral argument by *Mr. Spence*.

De W. C. Priest, for the respondent.

TAYLOR, J. This is an appeal from an order of the circuit court refusing to permit the plaintiff to amend her complaint so as to make one Charles P. Stoddard a co-defendant, on the ground that the defendant, *Varney*, had without consideration and fraudulently conveyed to said Stoddard a portion of his real estate, in order to cheat and defraud the plaintiff of a proper provision for her support, suit money, temporary and permanent alimony. This is a second action brought by the plaintiff against the defendant for a divorce from the bonds of matrimony. The first action was determined against the plaintiff, after a long and expensive litigation at the cost of the defendant. This action was commenced within a short time after the termination of the first, alleging as a ground of action a refusal on the part of the defendant to furnish the plaintiff a house and support. The answer is a general denial, and sets up by way of counterclaim cruel and inhuman treat-

Varney vs. Varney.

ment on the part of the plaintiff, and asks a divorce on defendant's part. The proof on the motion to amend shows that the defendant, under the order of the court, is paying to the plaintiff temporary alimony sufficient for her comfortable support.

The plaintiff alleges in her complaint that the defendant's property, real and personal, at the time of the commencement of this action, was worth the sum of \$30,000, and that his yearly income was more than \$2,000. The allegations of the complaint, in regard to the conveyance of the real estate to said Stoddard, show that it was conveyed to him May 3, 1878, and was recorded May 18, 1878. This was during the pendency of the first action brought by the plaintiff, which was decided adversely to her on the 19th of May, 1880. The value of the property conveyed is not alleged to exceed, at the present time, \$9,000. The defendant denies any intent to defraud the plaintiff, or put his property out of her reach, so as to prevent her from a support, either temporary or permanent; and alleges that the conveyance was made for the benefit of the National Christian Association, and that, being made without her signature, she has a dower right therein.

The only ground for making Stoddard a party defendant is to secure to her, in case she succeeds in obtaining a divorce, a suitable provision out of the estate of the defendant. And if it appears that the estate of the defendant not disposed of is ample for that purpose, there is no reason for making his grantee a party to the action. According to the evidence of both parties, the defendant still retains the bulk of his property, and there can be no reason for believing that it will not be sufficient to meet any demands which are likely to be adjudged in her favor, in case of a divorce from the defendant. The conveyance was made long before this action was commenced, and before the cause of action for which the divorce is demanded arose. In such case the conveyance should not be disturbed, except upon the clearest proofs of an intent to prejudice the rights of the plaintiff, and upon the clearest proof that her rights would be prejudiced if the conveyance

Varney vs. Varney.

is not set aside. See *Gibson v. Gibson*, 46 Wis., 449, 456. We think the evidence fails entirely to show any intention to prejudice her rights by the conveyance, or that her rights will be prejudiced in case of a divorce in her favor, if the conveyance is permitted to stand.

It will be seen by an examination of the case of *Damon v. Damon*, 28 Wis., 510, cited by the learned counsel for the appellant, that the plaintiff in that case made a very strong case, in her complaint, upon both of the points above suggested. The case came up upon a demurrer to the complaint, which admitted all the facts stated in the complaint. The learned counsel for the appellant in that case very properly said that the action had two purposes: first, to get a divorce and alimony, and then to subject the property held by the third party to the payment of the judgment for alimony, on the ground of fraud in the conveyance. It invokes the aid of the court to subject property of the defendant, conveyed with intent to defeat a judgment which the plaintiff may obtain, to the satisfaction of such judgment. And, applying the rules applicable to judgment creditors, the conveyance can only be set aside when there is not enough property remaining in the hands of the judgment debtor to satisfy the judgment. As a general rule, equity will not interfere to aid the judgment debtor, and set aside a conveyance as fraudulent, until it is shown that the defendant has no other property with which to satisfy the same. We think the learned circuit judge very properly refused the application to make Stoddard a defendant in this action, upon the evidence before him at the time the motion was made. As we are of the opinion that no appeal ought to have been taken by the plaintiff from the order of the circuit court denying the motion to make Stoddard a party to the action, the application for suit money to prosecute the same is denied.

By the Court.—The order of the circuit court is affirmed, without costs to either party, except that the respondent is required to pay the costs of the clerk of this court.

The Fond du Lac Harrow Co. vs. Bowles, imp.

THE FOND DU LAC HARROW COMPANY VS. BOWLES, imp.

February 8 — March 14, 1882

Liability of guarantor.

By contract between G. and plaintiff, G. was to have the *exclusive* right in certain places to sell harrows bought by him of plaintiff, and was to pay plaintiff for harrows so purchased either "by cash or note due July 1, 1879, with privilege of five months' extension, if desired, with ten per cent. interest." B. guarantied payment by G. for all purchases made by him under such contract, and payment of all notes "or renewals thereof," made by G. in pursuance of the contract. Afterwards, by a written addition to the contract with G., made without the knowledge of B., plaintiff gave him the privilege of selling harrows at a certain other place named. G. sold harrows at such other place, and gave his note for the amount due plaintiff therefor, payable *on or before* November 1, 1879, with interest after July 1, 1879, at ten per cent. In a suit on such note, *Held*,

1. That the liability of B. as surety was not affected by the additional agreement between G. and plaintiff as to the *place* of sale.

2. That there is no *material* difference between the form of the note in suit, given by G., and that described in the contract; and the surety is liable thereon.

APPEAL from the Circuit Court for *Fond du Lac* County.

Action upon a contract of guaranty executed by *Susannah Bowles* and others, and to foreclose a mortgage of land executed by *Susannah Bowles* to secure performance of such contract of guaranty. From a judgment in favor of said defendant *Susannah Bowles*, the plaintiff appealed.

The case is more fully stated in the opinion.

For the appellant there was a brief by *Shepard & Shepard*, and oral argument by *T. W. Shepard*. They argued, among other things, that the fair construction of the contract is, that Griffith was to be allowed such extension, not exceeding five months, as he might desire. Any ambiguity in this respect is to be construed most strongly against the guarantor. *Crist v. Burlingame*, 62 Barb., 351; *Locke v. McVean*, 33 Mich., 473; *Brandt on Suretyship*, §§ 78, 80. And it was not

The Fond du Lac Harrow Co. vs. Bowles, imp.

necessary that the note should be made payable July 1, and the extension afterwards separately granted. A note is but evidence of a debt, even though taken in payment of an account; the extension which the respondent insists should have been separately indorsed on the note, would have been but evidence of the extension; the incorporation of the extension into the note itself is but a combining of evidences, without in the least departing from the substance of the contract. See *Robinson v. Dale*, 38 Wis., 330. Moreover, the extension incorporated into this note was the most favorable one possible to both principal and guarantors—one that did not suspend for an instant the right of payment by either, while it did suspend the right of the creditor to compel payment during the period of the extension. Even if the contract is not to be construed as claimed above, yet Griffith was not cut off from his right to five months' extension by the incorporating of only four months thereof in the note. He was to have five months' extension if desired; he desired four months of it to be incorporated into the note, and that was done; he still had a right to an extension of another month, and a suit brought during that month contrary to his desire would have been dismissed as premature. No suit was in fact brought during that month; *non constat* that the delay was not at Griffith's desire; and the respondent's defense being affirmative, the burden of proof is upon her. *Robinson v. Dale, supra*. Again, the guaranty is broader than the contract to which it relates. Its language contemplates variance from the provisions of the contract by payment partly in cash and partly by note instead of wholly in one way or the other, by payment in several notes instead of one, by repeated renewals of the note or notes; in short, it leaves the appellant free as to how he shall arrange with Griffith for payment. Such being its frame, it will determine the guarantor's liability uninfluenced by any narrower provisions that the guaranteed contract may contain. *Bank of British N. A. v. Cuveillier*, 14 Moore's P. C. Cases, 187;

The Fond du Lac Harrow Co. vs. Bowles, imp.

Thompson v. Roberts, 17 Irish C. L., 490; *Simons v. Steele*, 36 N. H., 73; *Wadsworth v. Allen*, 8 Gratt., 174; *Parker v. Wise*, 6 M. & S., 239.

For the respondent there was a brief by *Giffin v. Williams*, and oral argument by *N. C. Giffin*. To the point that the taking of the note payable November 1, instead of July 1, and without any stipulation for extension, was such a variance as released the guarantor, they cited: *Walrath v. Thompson*, 6 Hill, 540; *Smith v. Dann*, id., 543; *Birkhead v. Brown*, 5 id., 634; *Leeds v. Dunn*, 10 N. Y., 469; *Dobbin v. Bradley*, 17 Wend., 422; *Wright v. Johnson*, 8 id., 512; *Henderson v. Marvin*, 11 Abb. Pr., 142; *Stewart v. Ranney*, 26 How. Pr., 279; *Appleton v. Parker*, 15 Gray, 173; *Locke v. McVean*, 33 Mich., 478; *Weed S. M. Co. v. Oberreich*, 38 Wis., 325; *Am. B. H., O. & S. M. Co. v. Gurnee*, 44 id., 49; *De Golyer on Guaranties*, 276; 2 *Parsons on Con.* (5th ed.), 17; *Hunt v. Smith*, 17 Wend., 179.

ORTON, J. The plaintiff and one S. N. Griffith entered into a contract at the city of Fond du Lac on the 17th day of December, 1878, by which the plaintiff was to sell and Griffith buy at least 107 harrows, to be delivered on the cars at that place; and Griffith was to have the exclusive right to sell them in certain places in the state of Minnesota named, and in Manitoba, and was to pay the plaintiff for the harrows he purchased, either "by cash or note, due July 1, 1879, with privilege of five months' *extension*, if desired, with ten per cent. interest." Attached to said contract was the following guaranty: "Having read the foregoing agreement, and understanding the terms and conditions therein, the undersigned, for value received and acknowledged, hereby guaranty that said Griffith will pay for all purchases made, and in case of payment of the whole, or any part thereof, by note, I guaranty payment of such note or notes, or any *renewals* thereof, at maturity or any time thereafter;" signed by *Susannah Bowles*,

The Fond du Lac Harrow Co. vs. Bowles, imp.

James H. Haskins, and Ruth A. Griffith. The said *Susannah Bowles* thereupon executed the mortgage sought to be foreclosed in this suit, to secure the plaintiff on said guaranty. Afterwards the following change was made in the contract: "In connection with the above territory allotted, we hereby give S. N. Griffith privilege to sell our harrows at Crookston, Minnesota, and vicinity." Signed by the plaintiff. The circuit court found that the plaintiff duly sold under the principal contract to the defendant Griffith, on the 6th day of March, 1879, 102 harrows for the price of \$1,306, and that plaintiff and Griffith had an accounting on the 5th of April, and the sum of \$997 remained due from Griffith to the plaintiff on such sales, and that Griffith executed the following note therefor:

"\$997. FOND DU LAC, WISCONSIN, April 5, 1879.

"On or before November 1st, after date, for value received, I promise to pay to the order of Fond du Lac Harrow Company \$997, at the Savings Bank of Fond du Lac, with interest at ten per cent. per annum, annually, after July 1, 1879, until paid.

"S. N. GRIFFITH."

It was further found that all of the harrows had been sold, and at Crookston, Minnesota, and that the change of the contract and the making of the note in this form were at the request of Griffith and without the knowledge of the defendant *Bowles*. The learned circuit judge found "that the taking of said note by the plaintiff from the defendant Griffith, payable November 1, 1879, instead of July 1, 1879, without the knowledge or consent of said *Susannah Bowles*, was a departure from the terms of said principal contract, which released said *Susannah Bowles* from all liability under her said guaranty of said principal contract, and annulled said mortgage." It was on this ground alone that judgment was rendered in favor of the defendant *Bowles*, and this presents really the only important question in the case. The learned counsel of the

The Fond du Lac Harrow Co. vs. Bowles, imp.

respondent, however, claims that there were other sufficient grounds for such judgment, such as the change in the contract by the addition of other territory in which the harrows might be sold, and the failure of Griffith to make sales, and his taking in a partner, Haskins, who made all such sales, and the fact that the sales were all made in such added territory.

It might be sufficient to say that this guaranty is strictly limited to the payment of the cash received and the notes given by Griffith to the plaintiff for harrows purchased, and was security for nothing else; and the learned counsel of the respondent very properly contends that the guaranty cannot be extended by construction beyond its terms. Griffith had the right and was bound to purchase of the plaintiff at least 107 harrows, and he purchased only 103 clearly within the contract, and it would seem that the guarantors could have no concern in any other part of the contract. Their liability is fixed as soon as the purchases are made, whatever becomes of the harrows afterwards.

The contract requires that Griffith should personally "work in introducing and selling said harrows in the territory [above allotted] in a thorough business manner." The learned counsel would not contend that the guaranty could be construed to make the guarantors liable for the failure of Griffith to perform this part of the contract. The change alleged of the addition of other territory was certainly very favorable to Griffith as well as to the plaintiff, in increasing the facilities of sales; but of course this would make no difference if such a change was material and the guarantors were concerned in this part of the contract. But this was really no change of the contract. The contract gave Griffith the *exclusive* privilege to sell the harrows in the places first named, and the pretended change gave him the privilege (not exclusive) to sell at Crookston. It does not appear that the plaintiff had any patent-right to dispose of with these harrows, or that they were patented at all. Griffith was not bound by the contract not to

sell anywhere except in the places named. He secured the *exclusive* privilege of selling in those places, and of course had the right and privilege of selling anywhere else, and even at Crookston, if he chose to do so without the consent of the plaintiff.

Whether the note is within the terms of the guaranty is the important question, and it is a very close one.

In all of the cases cited, and we think in all cases, where it was not clearly apparent that a substantial change had been made which discharged the guarantor, and yet where a change of some sort had been made, the *materiality* of the change has been the test. In that part of the brief of the learned counsel of the respondent in which it is argued that the change in the contract in respect to additional territory released the guarantor, *Mrs. Bowles*, he admits that such change must be material to have such effect. If that be so, then the difference between this note and that provided for in the contract must be *material*. There is a difference between the word "extension" in the contract and the word "renewals" in the guaranty; and yet it cannot be doubted that all parties understood and intended that these two words should have substantially the same meaning, so that we can say they are not *materially* different. And so the *materiality* of the difference between this note and the notes described in the contract is the real question. *Robinson v. Dale*, 38 Wis., 330; *Sage v. Strong*, 40 Wis., 575; *Gardner v. Van Norstrand*, 13 Wis., 543; *Stewart v. McKean*, 10 Exch., 675; *Smith v. Addison*, 5 Cranch C. C., 623; *Amicable M. L. Ins. Co. v. Sedgwick*, 110 Mass., 163; *Davey v. Phelps*, 2 M. & G., 300; *Finney v. Condon*, 86 Ill., 78; *Curtiss v. Hubbard*, 9 Met., 322; *Rice v. Filene*, 6 Allen, 230; De Golyer on Guaranties, etc., 398, and note.

It is unnecessary to cite other authorities, as they agree in holding that the changes or differences must be substantial and material to release the guarantor; and all of the authorities cited by the learned counsel of the respondent are to the

The Fond du Lac Harrow Co. vs. Bowles, imp.

same effect, and they will therefore not be considered, unless closely analogous in facts. The case more nearly analogous than any cited, and the one upon which the learned counsel of the respondent chiefly relies for the affirmance of the judgment, and the one the learned judge of the circuit court most probably relied upon in deciding the case, is that of *Locke v. McVean*, 33 Mich. (11 Post), 473. The contract in that case was, "that McVean shall give his note of hand for all purchases of machines at the time of purchase, said notes to be on four months' time, without interest. If so desired, an extension of time will be granted by O. M.* Locke, equal to sixty days on each note, said McVean to pay interest therefor at the rate of eight per cent. per annum." McVean gave his five several promissory notes to Locke, each payable six months after date, and each, except the second one, only drawing interest after four months, and then at the rate of eight per cent. The second note was so worded as upon its face to draw interest at seven per cent. from date for the first four months, and thereafter eight. As to the second note the court said: "Clearly this note was a great ways from being the same as one drawn pursuant to the plan covered by the guaranty and then extended sixty days;" and as to the other four notes it said: "But a short computation and comparison will prove that neither of these notes, in regard to length of time or amount of interest, is in substance the same as if drawn four months without interest, and extended sixty days, with interest at eight per cent. during that period. In every case the time and amount are both greater." It will be observed that the only possible reason for the court to say that the time and amount were both greater or even different, is that the extended time in the notes of two months is greater than or different from that in the contract of sixty days; and that without question constituted a material difference. This reason was amply sufficient for the exoneration of the surety in that case; but the court mentions two others, one of which is that

the right to compel reception of payment, and the surrender of the paper, was postponed; and the other that excess of time is afforded for transfer before maturity. The last reason certainly has no force whatever; for so far as the transfer of the note before maturity is concerned, there would be no difference. The extension would have to be made before the note became due, for then the rights of the parties as to the note are fixed and determined past alteration or change. The extension, to have any legal effect whatever, postpones the time of the maturity of the note, and keeps it from becoming due until the extension expires. The extension clause, if inserted in the note, would bind the holder with notice; and if not inserted in the note, the *bona fide* holder without notice would not be bound to extend the time of payment. The other reason, as to the right to compel the reception of payment, is of much force, and the court announced the true rule in such cases by saying, "and these are substantial differences."

In respect to this note, neither the time nor amount of the payment is different from that fixed in the contract, and the note is payable on *or before* the first day of November, 1879, so that the right to compel the reception of payment is not postponed. The contract does not require Griffith to exercise the privilege of extension on the first day of July or any other time, and here he exercised it when the note was given.

The real substance and effect of the contract in respect to the credit given to Griffith for harrows purchased of the plaintiff are, that such credit might be five months or less after July 1, 1879, with ten per cent. interest after that time, or until July 1, 1879, without interest, at the option of Griffith. He exercised that option or privilege in this case by obtaining four months' extension after July 1, 1879, on the above terms. It is evidently true that the *form* of this transaction, according to the contract and the guaranty, was to be

Spensley vs. The Lancashire Ins. Co.

that the note should be first drawn payable July 1, 1879, and that then, before its maturity, Griffith should exercise the privilege of having the time of payment *extended* not to exceed five months, or of having it *renewed* for such time. But wherein is the substantial difference? We are unable to see any material difference in the two cases, and we must therefore hold that the defendant *Bowles*, the guarantor, is liable to pay this note within the terms of her guaranty, and that the plaintiff is entitled to judgment of foreclosure of the mortgage to secure such guaranty.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with direction to render judgment of foreclosure for the amount found due upon said note in the sixteenth finding of fact.

SPENSLEY VS. THE LANCASHIRE INSURANCE COMPANY.

February 8—March 14, 1882.

NONSUIT. (1, 4, 5) *Circumstances under which peremptory nonsuit will not be ordered.*

INSURANCE AGAINST LIGHTNING. (2) *Policy construed.* (3) *Lightning defined.* (4) *Evidence of destructive effects of lightning in a tornado.*

1. Where the plaintiff's evidence, supposing it to remain undisputed, and giving to it the most favorable construction that it will legitimately bear, including all reasonable inferences from it, would sustain a verdict in his favor, a peremptory nonsuit should not be ordered.
2. The policy here sued on, insuring against "all loss or damage by fire" to the property described, expressly declares the insurer liable "for any loss or damage caused by lightning." *Held*, that this language covers all known effects of lightning, and not merely those arising from combustion.
3. The word "lightning," in its ordinary and popular sense, applies to any sudden and violent discharge of electricity, occurring in the course of nature, between positively and negatively electrified bodies, usually developing in its course the phenomena of light, heat and disruptive force.

Spensley vs. The Lancashire Ins. Co.

4. The property insured was destroyed by a *tornado*; and this court is of opinion that the plaintiff's evidence (largely set out in the opinion) so tended to show the presence in the tornado of electrical disturbance presenting the usual characteristics of lightning, in the ordinary sense of that word, and that such lightning was an active agent in destroying the property insured, that it was error to order a nonsuit.
5. If a question of fact should ever be taken from the jury on the mere testimony of experts (which is doubtful), at least this should not be done when there is any conflict in such evidence.

APPEAL from the Circuit Court for *Dane* County.

Action on a policy of insurance. The case is thus stated by Mr. Justice CASSODAY:

"On the afternoon of May 23, 1878, a heavy, dark thunder storm, giving evidences of considerable electric discharges along the lower edge, was seen from Mineral Point, stretching along the northern horizon, and apparently eight, ten or twelve miles from the city. At the western part of the storm an ordinary wind cloud sprang out and moved southward until it became distinctly separated from the thunder cloud by clear sky, and reached a point west of the city, when there appeared on the outer edge of this wind cloud, and some eight or ten miles west of Mineral Point, a whirlwind or tornado moving rapidly eastward; and it continued to move in that direction at the rate of about twenty-five miles an hour, through the counties of Iowa, Dane, and Jefferson, a distance of sixty-four miles, and varying in width from seventy yards to eighty rods. The tornado was narrow at the bottom and widened out at the top, having a revolving motion in the opposite direction to the hands of a watch, and occupying about thirty-six seconds in passing a given point at the center of its track. The force or forces within the tornado were so powerful as to take up, shatter, destroy, carry away, and scatter in promiscuous confusion, buildings and almost everything animate and inanimate, within its track, not firmly attached to the earth. Among the buildings so destroyed was the plaintiff's dwelling house, situated a little northeast of Mineral Point, and which was at the

Spensley vs. The Lancashire Ins. Co.

time covered by a policy of insurance issued by the defendant to the plaintiff, indemnifying him against all 'loss or damage by fire' to the property described, and expressly agreeing, in the written portion of the policy, 'that this policy is liable for any loss or damage caused by *lightning* to the property insured, not exceeding the sum insured nor the interest of the assured, and subject in all other respects to the terms and conditions herein mentioned and referred to.' Due notice and proofs of loss by 'lightning' were made and served as required by the policy. The defendant, however, denied all liability, on the ground that lightning was not an agency in the destruction of the building insured; and whether it was or not is the only issue involved in this action. Twenty witnesses, including an expert from St. Louis, were sworn and examined in behalf of the plaintiff. At the close of the plaintiff's testimony, the defendant moved for a nonsuit, which was denied by the court. Thereupon four expert witnesses were sworn and examined on the part of the defendant, to wit, James C. Watson, W. W. Daniels, and J. E. Davies, of the University of Wisconsin, and Thomas C. Chamberlain, of Beloit College, and state geologist, who was at Mineral Point at the time of the storm and witnessed the inception of the tornado. At the close of the defendant's testimony it renewed its motion for a nonsuit, which was granted by the court; and from the judgment entered thereon this appeal is brought."

For the appellant there were briefs signed by *P. A. Orton* and by *Lanyon & Spensley* with *P. A. Orton*, of counsel, and oral argument by *Mr. Orton* and *Mr. Spensley*. They cited *Langhoff v. M. & P. du C. R. R. Co.*, 19 Wis., 497, *Imhoff v. C. & M. R. R. Co.*, 22 id., 682; *Schomer v. Hekla Fire Ins. Co.*, 50 id., 575; 3 Wait's Pr., 158; *Colt v. Sixth Av. R. R. Co.*, 49 N. Y., 671; and argued that, assuming the phenomena of the tornado to have been as described by plaintiff's witnesses, and that, as Prof. Tice testified, it was wholly attributable to electricity, which was the only destruc-

Spensley vs. The Lancashire Ins. Co.

tive force in it, the court cannot say, as matter of law, that the defendant is not liable on the policy for the loss.

For the respondent there were separate briefs by *Moses M. Strong*, its attorney, and *J. W. Lusk*, of counsel.

Mr. Strong cited the following cases as to the authority and consequent duty of the court to order a nonsuit in proper cases: *Hunter v. Warner*, 1 Wis., 141; *Gardinier v. Otis*, 13 id., 460; *Bacon v. Bicknell*, id., 555; *Dodge v. McDonnell*, 14 id., 553; *Barton v. Kane*, 17 id., 38; *Harrison v. Juncau Bank*, id., 340; *Achtenhagen v. Watertown*, 18 id., 331; *Laubenheimer v. Mann*, 19 id., 519; *Cornelius v. Appleton*, 22 id., 635; *Blair v. Dockery*, 24 id., 502; *Cutler v. Hurlbut*, 29 id., 152; *Jackson v. Bellevue*, 30 id., 250; *Lawrence University v. Smith*, 32 id., 592; *Delaney v. M. & St. P. Railway Co.*, 33 id., 67; *Smith v. Sloan*, 37 id., 285; *Strohn v. Hartford Ins. Co.*, id., 626; *Hæflinger v. Stafford*, 38 id., 391; *Ewen v. C. & N. W. Railway Co.*, id., 628; *Greening v. Bishop*, 39 id., 553; *Planer v. Smith*, 40 id., 33; *Hoyt v. Hudson*, 41 id., 105; *Meyer v. Hanchett*, 43 id., 248; *Furlong v. Garrett*, 44 id., 125; *Gummer v. Omro*, 50 id., 251; *Gumz v. C., M. & St. P. Railway Co.*, 52 id., 672; *Brusterg v. M., L. S. & W. Railway Co.*, 50 id., 231; *Elmore v. Hill*, 51 id., 365. As to the rule regulating compulsory nonsuits, he cited *Hunter v. Warner*, 1 Wis., 150; *Furlong v. Garrett*, 44 id., 125; *Schomer v. Hekla Fire Ins. Co.*, 50 id., 575; *Dodge v. McDonnell*, 14 id., 553; *Merchants' Bank v. State Bank*, 10 Wall., 637; *Pleasants v. Fant*, 22 id., 121; *Comm'rs of Marion Co. v. Clark*, 94 U. S., 278; *Ryder v. Wombwell*, L. R., 4 Exch., 33; L. R., 2 P. C. App. Cas., 335. He reviewed the testimony at length, contending that there was not such a preponderance of evidence in the case that the insured building was destroyed by lightning, as would have justified a verdict for the plaintiff.

Mr. Lusk, after reviewing the testimony, urged that the words "loss or damage caused by lightning," in the policy,

Spensley vs. The Lancashire Ins. Co.

should be construed as ordinary people would construe them, and that neither party to the contract could have understood or intended that such words would cover damages caused by a tornado or whirlwind. 2 Parsons on Con., 494, 500; 3 U. S. Dig., 459 et seq.; *Robertson v. French*, 4 East, 135; *Schuylkill Nav. Co. v. Moore*, 2 Whart., 491; *Kenniston v. Ins. Co.*, 14 N. H., 342; *Babcock v. Montgomery Ins. Co.*, 6 Barb., 644; *S. C.*, 4 Comst., 326; *Austin v. Drew*, 4 Campb. N. P., 360; 2 Marsh., 130; *Everett v. Assurance*, 115 E. C. L., 126.

CASSODAY, J. It is urged by the learned counsel for the respondent, that "to justify a verdict for the plaintiff it must appear, from a preponderance of evidence in the case, that the insured building was destroyed by lightning," and therefore that the nonsuit was properly granted; and in support of the contention several cases are cited. In neither of the three cases cited from the supreme court of the United States was there a peremptory nonsuit, but each was submitted to the jury. Two of the cases were affirmed, and one reversed for instructions in favor of the defendant not warranted by the evidence. In *Doe v. Grymes*, 1 Pet., 469, not cited, it was held at an early day that "the courts of the United States have no authority to order a peremptory nonsuit against the will of the plaintiff on the trial of a cause before a jury." *D'Wolf v. Rabaud*, 1 Pet., 476. It was probably in pursuance of this rule that Judge MILLER refused a peremptory nonsuit in *Hyde v. Barker*, 1 Pin., 305, and *Baxter v. Payne*, id., 501, criticised by counsel, and each of which was decided by a federal court. A similar rule prevails in several of the states. But in this state we have had a different practice from the first, and the right to a peremptory nonsuit in a proper case is conceded by all. The only difficulty arises in the limitation and application of the rule.

In *Barden v. Smith*, 7 Wis., 439, it was held that "it is

Spensley vs. The Lancashire Ins. Co.

error to nonsuit the plaintiff when evidence has been given on his behalf sufficient to justify a verdict in his favor." To the same effect is *Johnston v. Hamburger*, 13 Wis., 175.

In *Dodge v. McDonnell*, 14 Wis., 553, it was held that "the court should not nonsuit a plaintiff when there is any evidence, which, by the most favorable construction that could be legitimately given it, would sustain a verdict in his favor." To the same effect are *Colby v. Franklin*, 15 Wis., 311; *Langhoff v. Railway*, 19 Wis., 489.

In *Imhoff v. Railroad Co.*, 22 Wis., 681, PAINE, J., said: "On a motion for a nonsuit the court is bound to give the evidence the most favorable construction for the plaintiff which it will possibly bear." In support of this he cites New York and Ohio cases, and quotes approvingly this from Judge RANNEY: "All that the evidence in any degree tends to prove, must be received as fully proved; every fact that the evidence, and all reasonable inferences from it, conduce to establish, must be taken as fully established." Page 684.

In *Lawrence University v. Smith*, 32 Wis., 592, the question was whether the direction of a verdict for the plaintiff was error, and DIXON, C. J., giving the opinion of the court, said: "The rule is the same as that which obtains where a motion for a nonsuit is made, and where it is held that the court must look at the facts in the most favorable light for the plaintiff in which the jury would be at liberty to find them, and then be able to say that there is no evidence which would justify a verdict in his favor."

These statements of the law have been fully sanctioned by this court in the cases of *Schomer v. Hekla Fire Ins. Co.*, 50 Wis., 579; *Jucker v. Railway Co.*, 52 Wis., 150.

In *Jones v. Railway Co.*, 49 Wis., 352, Mr. Justice TAYLOR said: "If the plaintiff gives any evidence to support his claim, the case must be submitted to the jury, although in the opinion of the trial judge it may be insufficient to sustain a verdict, or the decided weight of evidence is for the defendant. In such

Spensley vs. The Lancashire Ins. Co.

case this court has repeatedly said that it is the duty of the court to submit the questions of fact to the jury, under proper instructions, and take their verdict thereon."

In *Townley v. Railway Co.*, 53 Wis., 626, several English and American authorities were cited to sustain the rule that, "where the standard of the defendant's duty is a shifting one, and the facts or the inferences to be drawn therefrom are in dispute or ambiguous, the question of the defendant's negligence should not be taken from the jury."

From the authorities cited it is manifest that the trial court was not, and this court is not, called upon to weigh and determine the preponderance of evidence. If a plaintiff has no right to have his cause submitted to the jury unless there is a preponderance of the evidence in his favor, then by parity of reasoning the defendant has no right to have it submitted to the jury unless there is a preponderance of evidence in his favor. If this is so, then, as the evidence must always preponderate in favor of one party or the other, or else be equally balanced, it would follow that the court would always be justified in taking the case from the jury on the motion of one party or the other, except when the evidence was equally balanced. Such, however, is not the rule. The simple question is, whether the evidence in behalf of the plaintiff, had it remained undisputed, and giving to it the most favorable construction it will legitimately bear, including all reasonable inferences from it, is sufficient to justify a verdict in favor of the plaintiff. In other words, is there evidence, when so construed, tending to prove that lightning was an agency in the destruction of the plaintiff's building, within the meaning of the policy?

We agree with LORD ELLENBOROUGH, C. J., in the case cited, that the policy "is to be construed according to its sense and meaning, as collected in the first place from the terms used in it, which terms are themselves to be understood in their plain, ordinary and popular sense," etc. *Robertson v. French*, 4 East, 135.

Spensley vs. The Lancashire Ins. Co.

In *Kenniston v. Ins. Co.*, 14 N. H., 341, the policy was "against loss or damage *by fire*, whether the same shall happen by accident, lightning or any other means." The evidence tended to show that the house had been struck by lightning, and parts of it and the contents materially injured, leaving some slight traces of fire, and a verdict was taken for the plaintiff. Giving the opinion of the court, PARKER, C. J., said: "If the damage was from lightning without any combustion, it is clearly not within the terms of the contract of insurance. The policy does not provide against every damage which may arise from the action of the electric fluid." Because the evidence did not make it certain that the building "was set on fire by the lightning," the direction of a verdict for the plaintiff was held error, and a new trial ordered, with directions to submit that question to a jury. It is very clear from the opinion that had not the policy limited the liability to "losses by fire," the direction of a verdict for the plaintiff would have been sustained, even in the absence of any proof of combustion.

In *Babcock v. Ins. Co.*, 6 Barb., 637, the stipulation in the policy was: "The company will be liable for fire by lightning." The question considered on demurrer was, "whether the destruction of the dwelling house . . . by being rent and torn to pieces by lightning, without being burnt or consumed, is a loss covered and insured against by the policy." The court held that it was not, and gave judgment for the defendant. The ground of the decision is, that "the terms of the policy exclude the idea that it was intended to cover damage by lightning when there was no ignition." That judgment was affirmed in the court of appeals (*S. C.*, 4 Coms., 316); and while the opinion of that court, as well as the court below, is replete with scriptural, literary and scientific research, showing clearly that there can be no such thing as "fire" without "ignition," "combustion" or "burning," yet it affords us but little aid in determining this question of nonsuit. It is, how-

Spensley vs. The Lancashire Ins. Co.

ever, a fair inference from the opinion that, had the policy been against loss by lightning generally, instead of being limited to loss by fire, the company would have been held liable. In the opinion it is said: "Treating electricity as an agent which is capable of producing destructive effects, it is mainly, if not altogether, in reference to its well known modes of *mechanical and chemical* action that danger is to be apprehended to property; and it is therefore only as against these that insurance would naturally be required. No doubt it would be proper for the owner of property to ask for indemnity against all the effects of lightning, as it would clearly be competent for the insurer to limit the policy to certain specified effects. In case of a general insurance against lightning, as the risk would be increased beyond what it would be in case it were limited to only one known effect of it, it is to be presumed that the rate of premium would be proportionately enhanced." Page 336.

The policy before us is a general insurance against lightning, and most certainly covers all known effects of electricity coming under the general head of lightning. What, then, is to be understood by the word "lightning" in its "plain, ordinary and popular sense?" Counsel asks whether the mass of mankind look upon a whirlwind as lightning; whether any person, speaking of a house being destroyed by lightning, supposes he is talking about a tornado? A *tornado* is defined by Webster as "a violent gust of wind, or a tempest, distinguished by a whirling, progressive motion, *usually* accompanied *with* severe thunder, lightning, and torrents of rain, and commonly of short duration and small breadth; a hurricane." The Imperial and other dictionaries and encyclopædias give substantially the same definition. The same dictionaries tell us that a hurricane is "generally accompanied by thunder and lightning, and rain or hail;" and the Imperial Dictionary says that they "*appear to have an electric origin.*" The same dictionary says that lightning is "a sudden discharge of electricity from

Spenaley vs. The Lancashire Ins. Co.

a cloud to the earth, or from the earth to a cloud, or from one cloud to another—that is, from a body positively charged to one negatively charged,—producing a vivid flash of light, and usually a loud report called thunder.” The same dictionary defines electricity as “the name given to the cause of a series of phenomena exhibited by various substances, and also to the phenomena themselves. We are totally ignorant of the nature of this cause—whether it be a material agent or merely a property of matter. But as some hypothesis is necessary for explaining the phenomena observed, it has been assumed to be a highly subtile, imponderable fluid, identical with lightning, which pervades the pores of all bodies, and is capable of motion from one body to another. . . . Electricity, when accumulated in large quantities, becomes an agent capable of producing the most sudden, violent and destructive effects, as in thunder storms; and even in its quiescent state it is extensively concerned in the operations of nature.”

Such are the meanings of the words referred to, in their plain, ordinary and popular sense. The general conviction of danger from lightning is attested by the forked wires projecting from the tops of multitudes of buildings throughout the country; not so much from the combustion which sometimes results from an electrical discharge striking an ordinary object, as a tree or a building, but the disruptive effect which perforates, tears and shatters. The question recurs, whether we can say from the evidence that lightning was present as an active agency in the destruction of the dwelling-house in question. The evidence is too voluminous to be passed upon in review; but the case is so unique and important in its consequences that we are induced to quote two sentences from the printed case, and a few extracts from the summary of facts in the very able, fair and exhaustive brief of the senior counsel for the respondent, who concedes that “a large amount of electricity, lightning and thunder attended this force (the tornado) and was a component part of it.” “A few minutes before the

Spensley vs. The Lancashire Ins. Co.

tornado storm came, it was intensely hot; the air was stifling. The air was very calm indeed when the cloud was approaching, and it was calm right after the storm came. It was a clear day; the sun was shining until the storm came up. It was clear right after the storm passed—probably in five minutes. There was hail before the tornado, about the size of a crab-apple, with prickles on them, similar to those on a gooseberry.”

The plaintiff, as a witness, said: “We had a patch of wheat adjoining the house, and the next morning it looked as though it had been seared—as if there had been a heavy frost; the leaves were turned white on the tops; looked as though there had been a heavy frost, and were all killed. I noticed the same effect on the grass and trees; it looked exactly like trees that you have seen that had been struck by lightning; they had a dead look about them, just exactly as when you see a tree that has been struck by lightning. The trees were in full foliage. This was general in the track of the tornado. I noticed this the day afterwards; the day or two afterwards I noticed it particularly. The trees were split up just exactly as you have seen trees that had been struck by lightning; you can see the fibres all the way through. They were split in various ways, but were split right down, and some of them you could see the bark stripped off, and some partly stripped off. The storm sometimes stripped the bark off entirely; I have seen several that the bark was entirely stripped off, limbs and all.”

The witness Edvine testified: “The vegetation appeared to be burned, and in appearance very much like a frost that had been on the vegetation; that is, the wheat, oats, grass and so forth; also the trees, the foliage was killed. The next day I noticed that the leaves were withered. It splintered the trees entirely up. I noticed the bark stripped off of several trees; stripped entirely off from within two or three feet of the ground up to the very top. I have seen trees that were not

Spensley vs. The Lancashire Ins. Co.

twisted at all; some were twisted, some were not, but the bark torn off."

The plaintiff, *John Spensley*, testified: "There was a large white-oak tree near my house; there were two limbs on it forking off each way, and it struck right vertically where the limbs connected with the tree and split right down. One part of the tree is gone entirely; the other part is standing there yet. It was split to perhaps two or three feet of the surface. I should think the tree was eight or ten inches through; I should think the split portion was six or seven feet long. It was probably forty or fifty feet from the house."

The witness Wasley testified: "Plaintiff had a field of wheat just on the south side of the building, within ten or fifteen feet; it was just as yellow as though there had been a heavy frost. The foliage of the trees was all shriveled up; lost their green color right away the next day."

John Lanyon testified: "I noticed the effect of the tornado within an hour after it passed over *John Spensley's* house. Some trees had been broken and shattered, and were blackened from some cause that I do not know, but had the appearance of some that I have seen that had been struck by lightning. Next morning I noticed the appearance of the leaves of the trees near *Spensley's* house; they were blackened and curled up. I could then trace the track of the tornado by the discoloration of the leaves."

B. Harker testified: "The leaves all through the track of the tornado seemed to be curled up and burnt. I lived on high land, and within a few days after the tornado I could trace the track of the tornado for one and one-half to two miles west, by the color of the leaves being burnt brown and the leaves being green before, and the leaves on each side of the tornado being then green. I saw several trees on each side of *Spensley's* house, that were slivered and split up as if struck by lightning."

Colon Goldsworthy testified: "Could distinguish the track

Spensley vs. The Lancashire Ins. Co.

of the tornado from Kealey's to the brewery for a month afterwards, by the discoloration of the leaves. Two days after the tornado I noticed near *John Spensley's* house that the tops of the grain and grass all seemed to be discolored as if frozen or burnt, I could not tell which; and could see the track of the tornado from any hill for a month afterwards. Within two days after the tornado I noticed, in passing over the track of the tornado, that the trees and rubbish seemed to be snuttet or scorched as if burnt; some of them, but not all."

The plaintiff, as a witness, testified: "I saw constant flashes of lightning; they came and went away. There was a continuous roar of thunder; sometimes loud and then not quite as loud. The flashes of lightning seemed to be very near the earth. I remember distinctly one flash. I never saw anything like it in my life. It took my eyesight, I should think, for two or three seconds. I could not see, it was so dazzling."

John Addington, a witness, testified: "When I was in the garden, there came such a flash of lightning that it scared me, so that I dared not stop there. That came from the west. It struck perpendicular. I saw the lightning, and it struck down as though it was going to strike the earth right up, and scared me so I darsent stop. Then in about a minute or two there was another such flash came out of the south. When I got into the wood-shed I sat down on a log of wood, and the lightning came so I thought the wood-shed would be afire every minnte. . . . When I had sat there a little while, there came such a flash of lightning as I never saw in my life—never. And when the flash came, the wood-shed was gone like that [indicating]—just as quick as that. I fell down, and it took my hat off as I fell; took my hat right away. I looked up, and the top of the wood-shed was gone; all smashed up; gone right away. The wood-shed was struck on the north side. There was four cords of wood laid against that side, and it just lifted the four cords of wood and the sill and all about half a yard towards me; and the other side, it lifted that about half

Spensley vs. The Lancashire Ins. Co.

a yard away from me, and set it on another beam outside. In the wood-shed at the time it had all the appearance of lightning. When the storm came I could not tell anything else. It would be impossible to tell anything else."

Edmund Edivine, at the time of the storm, was at plaintiff's furnace, one-quarter of a mile from his house, which was on much higher ground than the furnace, southeast from it, and in plain view. He saw the storm approaching from the west, some miles distant. He says: "My attention was particularly attracted to it [the storm] by the flashes of lightning. I saw it when it was very small. There was a cloud on either side, and this one appeared to be coming up in the center of the storm. These others on either side came in contact and appeared then to make a whirling motion right there, as it rolled nearer. I supposed, from the continuous lightning that was flashing from it, that it was something unusual; it must be a cyclone or a tornado, or something of that nature. As it drew near I observed in the center of this cloud a fiery, luminous light. I supposed it was a fire, something like a head-light on a locomotive, and issuing from that flashes of lightning — continued lightning. It was near the earth. As it drew near the light was more brilliant; could see plainer. Could see the light in the center. It rushed right by, and the house was gone in an instant. I saw the storm when it struck the house. I could see the light from behind; flashes of lightning continually — a continuous roar of thunder with it. At the time the storm struck the house, it was in a funnel shape. The lightning was like fire; just like fire light. There was a light illumination when it struck the house; lightning flashing in every direction continually, and a continuous roar of thunder. Noticed just before it came up to the house a ball of fire came right down, and tore up some ground close by the house, between the furnace and the house. The storm, after it passed the house, continued in the same way."

Edward Addington, in his deposition, says: "When the

Spensley vs. The Lancashire Ins. Co.

tornado struck *John Spensley's* house, I was about one-fourth of a mile northwest of *John Spensley's* house, at the furnace door, and about sixty feet lower than *Spensley's* house. The furnace is in a ravine, and *Spensley's* house is on a hill. I was in full view of *Spensley's* house when the tornado struck it. The tornado appeared to be about one-third of a mile in width, and coming from the west. When the tornado struck *Spensley's* house, the lightning was cutting in every direction. It was so dark I could not see the house when the tornado struck it."

Anna B. Bennett says: "I could see *John Spensley's* house from my place. I saw the tornado coming towards my house from the direction of *John Spensley's* house. It was like a rolling cloud of smoke as it came to my house. The appearance of the tornado was that of fire and smoke, and I smelt the smell of sulphur, and I saw the fire, and it was bright, and it was all around. This was about four o'clock in the afternoon. Our house was completely demolished. The time that I saw the fire lasted less than two minutes; the effects of the tornado did not last any longer than I saw the fire. . . . The fire affected my person at that time. I was burned on the side of my neck, and the back of my head. My hair was burned on one side of my head. I had a very sore spot from the effects of the burn. I do not know of any other cause except the heat that was in the tornado. There was no fire in the house at the time. The fire I saw in the house that day was what we commonly call lightning."

The plaintiff, as a witness, in speaking of the demolition of the house and deposition of the debris, says: "There was not anything left of the house except the foundation walls, and they were partly thrown in; the house was completely destroyed; there were a great many timbers that were just mashed right up into splinters; seemed as if they had been rubbed together almost, and broken to splinters; the timbers were scattered all over; one of the main sills I should think was carried a hundred yards—a piece of timber 8x8,—and was driven nine feet into the ground, and then broken off in

Spensley vs. The Lancashire Ins. Co.

pieces; this timber was southeast from the house. I found the contents of my building at different distances all around the neighborhood; the principal part of the debris was right there; it was mashed to pieces, and right there on the ground; of course there were pieces of it carried a considerable distance. The lumber that came from the building was all splintered up; there were very few pieces that could be used for anything after the house was destroyed; I do not remember of seeing as much as fifty feet of siding from my house after the storm."

The witness Edvine says: "Everything was shattered to pieces — to splinters. The rubbish was scattered over from 150 to 200 yards of ground, probably — right there. Then, of course, there were parts of the house at a great distance." The witness Wasley says: "The debris from the house was considerably shattered; I don't think you could find twenty-five feet of siding; all split and broken small into kindling wood."

The witness Mrs. Coates, who was in the cellar of the plaintiff's house at the time it was demolished, in describing what occurred immediately after, says in her deposition: "I went into the next room, and smelt the fire and saw the smoke. The cellar was divided into three parts; when the tornado passed we were in the southwest room; we then went into the north part of the cellar, and it was then that I saw the fire and smelt the smoke; and the fire was in the southeast part, which is the vegetable cellar. I supposed my mother was in the ruins and would be burned up, and I called upon Mr. Addington to put out the fire. I saw the fire in the cellar myself; I could not say what it was that was burning; it was a pile of something that had blown there and had caught fire."

The witness Wasley says: "I was at the house about fifteen or twenty minutes after the storm passed; the house was entirely destroyed; I saw fire in the debris of the house. It was in the basement under the main part of the house. The cellar under the main part was divided into three apartments.

Spensley vs. The Lancashire Ins. Co.

. . . The fire was right under the parlor; that would be the main part, on the east side — on the southeast. I was the first to find it. . . . The fire, when I found it, was getting pretty good headway. There was a lot of cloth that had got on fire, and some dirt or rubbish. I took a big piece of plank and beat it out.” On cross examination he said: “There was some cloths and rubbish burning there, also some wood — pine — the wood that the building was composed of, burning with this rubbish. I put it out by slapping it with a board. I could not tell how long it had been burning. No member of the family spoke to me about it. I doubt if either one of them had been near the building after the tornado; they were not in the cellar where the fire was. A portion of the floor had been thrown over, and the fire was underneath it.”

The witness Edivine says: “At the time, I noticed the smell of sulphur at the house. When I went there first, it was quite powerful; then it kind of diminished.”

The plaintiff's mother-in-law, Mrs. Walker, was in his house at the time of the fire, and was killed; and the evidence tends to show that one side of her face was burned, and the other side was bruised and cut, and the hair on one side of her head was burned off close to her head.

Following the rule of law indicated, and giving to the testimony the most favorable construction it will fairly bear, and deeming, for the purposes of this appeal, everything as fully proved which the evidence in behalf of the plaintiff tends to prove, and assuming to be established every fact which such testimony, and all reasonable inferences from it, conduce to establish, can we say there was no evidence which, if undisputed, would justify a verdict for the plaintiff? Applying that rule, can we say that the condition of the atmosphere immediately before and after the destruction; the hail and the rain; the seared condition of all vegetation about the building; the rending of the oak tree a few feet from the house; the bolt of lightning striking close on the other side; the ball of fire like

Spensley vs. The Lancashire Ins. Co.

the head-light of a locomotive at and about the building at the moment of destruction; the fire in the basement immediately after the storm, when there had been no fire in the building immediately before; the burned condition of Mrs. Walker, who was in the house at the time and was killed; and the shattered, splintered and powdered condition of the timbers and almost every part of the building,—did not tend to prove the presence of disruptive discharges of electricity as an active agency in destroying the building? It is true, the wind was present in terrible force, but that increases instead of diminishing the probability of the presence, also, of a powerful electrical force, since a tornado is usually accompanied with lightning, and, as counsel admit, was a component part of it in this case. Had the conditions named existed without the presence of severe wind, we apprehend they would readily have been attributable to the effects of electricity. Did the mere presence of wind in great force entirely remove the evidences and inferences which otherwise existed? It is true, the experts on the part of the defendant attribute much of the phenomena to the severity of the wind. But, as suggested, by Mr. Justice LYON in *Copp v. German American Ins. Co.*, 51 Wis., 643: "We greatly doubt whether the court can properly assume a fact to be proved, and take it from the jury, if the proof (on the part of the defendant) consists mainly of the testimony of experts, as it does in this case. It is only when the testimony leaves no reasonable doubt of the fact that the court should exercise that power; and in the very nature of things there are usually elements of doubt, uncertainty and inconclusiveness in expert testimony. It is upon this principle that, in actions for infringements of patents and trade-marks (which usually depend upon expert testimony), the courts do not decide the question of infringement on demurrer to the pleadings, no matter how clearly the infringement or non-infringement may be alleged therein, but put the parties to their proofs."

It is certainly common in patent cases to submit the ques-

Spensley vs. The Lancashire Ins. Co.

tion of infringement to the jury, even where the patented machine and the infringing machine are both present in court, and thus inspected by the court. True, the law may be properly regarded as a science, but it consists in applying certain principles to admitted or a given state of facts. It certainly cannot be the province of the court, in an action at law triable by a jury, to determine abstruse and occult scientific facts, even when enlightened by the wisdom of learned experts, especially where their opinions are in conflict. We have no disposition to disparage that class of testimony, for it is frequently very highly instructive, especially when confined to the admitted facts of a given case; but its province is to aid those who are required to determine the facts, and in such a case they are to be determined by the jury. Whether the wind theory of the defendant's experts, or the electric theory of Professor Tiee, is correct or not, may have an important bearing upon the weight of the evidence, circumstances and inferences tending to prove or disprove the presence of disruptive discharges of electricity as an agency in the destruction of the plaintiff's house. Assuming that two forces were present, wind and electricity, either of which was sufficiently powerful to be an agency in the destruction of the building, yet it would not be for the court to say that such destruction was wrought wholly by the one to the entire exclusion of the other. The question for the jury is, whether lightning was a sufficient agency in such destruction; and the question for the court is, whether, within the rule stated, there is any evidence tending to prove that lightning was such an agency.

The majority of the court being of the opinion that there is such evidence, the judgment of the circuit court is reversed, and the cause is remanded for a new trial.

LYON and TAYLOR, JJ., dissent.

Hardy and another vs. Scales and others.

HARDY and another vs. SCALES and others.

February 10 — March 14, 1882.

ESTATES OF DECEDENTS. *Rights of testator's widow as to property not disposed of by the will.*

1. Since the territorial statutes of 1839, the statutory rule in this state has been, that a testamentary provision for the widow was presumptively *in lieu* of dower, unless the will itself showed plainly that such provision was *in addition* to dower.
- [2. Whether, under sec. 18, ch. 89, R. S. 1858, a provision in the will, not renounced by the widow, excluded her from dower in real estate *not disposed of* by the will, is not here decided.]
3. Prior to ch. 106 of 1877, the widow took her share of the *personal* property under the statute of distributions, unless excluded by the will itself, without being compelled to make her election.
4. Under ch. 106 of 1877, where a will makes provision for the widow, she is excluded from any share of *either the real or the personal estate* of the testator, left undisposed of by the will, by virtue of the right of dower or under the statute of distributions, unless she duly renounces the provision so made for her in the will.
5. The statute of 1877 repeals by implication subd. 6, sec. 1, ch. 99, R. S. 1858.

APPEAL from the Circuit Court for *La Fayette* County.

In September, 1877, Samuel H. Scales died in La Fayette county, leaving surviving him his widow and six children, his only heirs-at-law. By his will, which was duly admitted to probate, he gave to his widow an undivided half of certain real estate, including the homestead, and of the personal property in use thereon, for her life, and to his son *Samuel H. Scales, Jr.*, the other undivided half of said real and personal property, and an estate in remainder in the half given to the widow, expectant upon her death. There was no residuary clause in the will, and the deceased left, in addition to the property above mentioned, a large amount of real and personal property, as to which he died intestate. The widow filed no notice of an election to take the provision made for her by law, instead of the provision made by the will, but took possession

Hardy and another vs. Scales and others.

of the property devised to her, claiming the same under the will. The action was brought by two of the children and heirs of the deceased, against the executors of the will and against the widow and other heirs, for a construction of the will; the plaintiffs contending that the widow had no right to any portion of the estate of the deceased except what was specifically given to her by the will; and the defendants contending that, in addition to what was so given to her, she was entitled to dower in all the real estate of the deceased as to which he died intestate, to one-third of the rents and profits thereof received pending the settlement of the estate, and to one-seventh of all the personal property undisposed of by the will. The circuit court, as conclusions of law, held that it did not appear to have been the intention of the deceased, as expressed in his will, that his widow should have any portion of his real or personal property which was not disposed of by said will, and that she, having failed to file a notice of other election, had presumably elected to take the provision made for her by the will, and was not entitled to any portion of or dower estate in any of the real or personal property of the deceased, not specifically given to her by the will. From a judgment accordingly, the defendants appealed.

W. E. Carter and *T. J. Law*, for the appellants, argued, among other things, that it is only as to estate which a testator has assumed to dispose of, that a widow is put to her election. As to other property, the statutes as to intestate estates must govern. In case of partial intestacy, the persons entitled to distribution take, not in pursuance of the intention of the testator, but by force of law and regardless of what his intentions may have been. The widow is entitled to participate in the distribution of that part of a testator's estate as to which he dies intestate. In such cases both the next of kin and the widow take under the statutes of distribution, and one cannot acquire the right unless the other does also. 1 *Williams on Executors*, 650, note 6; 2 *id.*, 1475; 1 *Perry on Trusts*, secs.

Hardy and another vs. Scales and others.

152, 155, 158; Story's Eq. Jur., §§ 1075, 1208; Hill on Trustees, 118; 2 Jarman on Wills (5th Am. ed.), 136, 211, 213, 214; *Nickerson v. Bowly*, 8 Met., 430; *Cushing v. Blake*, 3 Stew. Eq. (N. J.), 695; *Hand v. Marcy*, 1 id., 59; *Davies v. Dewees*, 3 P. Williams, 40; *Oldham v. Carleton*, 2 Cox, 399; *Kempton's Case*, 23 Pick., 163; *Dale v. Johnson*, 3 Allen, 364; *Skellinger v. Skellinger*, 5 Stew. Eq. (N. J.), 659; *Hays v. Jackson*, 6 Mass., 149; *Hill v. Hill*, 2 Hayw. (N. C.), 298; *Dunlap v. Ingram*, 4 Jones, Eq., 178; *Paup v. Mingo*, 4 Leigh, 763; *Wilson v. Wilson*, 3 Binney, 557; *S. C.*, 9 S. & R., 424; *Grasser v. Eckart*, 1 Binney, 575; *Darrah v. McNair*, 1 Ashm. (Pa.), 238; *Den v. Allen*, Penn. (N. J.), 24; *Dicks v. Lambert*, 4 Vesey, 725; *Pickering v. Lord Stamford*, 2 Vesey, Jr., 272, 581, 336, 492. The right of the widow to a share in the personalty is clear. Ch. 106, Laws of 1877, did not operate to repeal subd. 6, sec. 1, ch. 99, R. S. 1858. There is no conflict between the two statutes. They deal with entirely different subjects. One provides for the disposition of property as to which a person dies intestate, whether or not he may have left a will. The other treats of estates in dower. Statutes must, if possible, be so construed as to avoid repugnancy; and if the provisions of different statutes are, after all, found to be repugnant, each chapter or statute governs as to all matters and questions growing out of the subject matter of such chapter or statute. R. S. 1858, ch. 191, sec. 11; *Mead v. Bagnall*, 15 Wis., 156; *Woodbury v. Shackelford*, 19 id., 55; *Schieve v. The State*, 17 id., 253.

For the respondents there was a brief by *Orton & Osborn* and *P. B. Simpson*, and oral argument by *H. S. Magoon*.

COLE, C. J. In this case the learned counsel did not disagree as to the rule of the common law which put the widow to an election between the provisions made for her by the will of her husband and her right of dower. They fully agree that dower was a legal right which was much favored by the

Hardy and another vs. Scales and others.

courts, and that the presumption was that a provision for the widow in the will was a matter of bounty, and was not intended to exclude dower unless it was so expressed in the will, or there was a clear implication to that effect. But it is conceded that this rule of the common law was long since changed by statute here, and the presumption reversed; and that since the adoption of the Revision of 1839, by the territorial legislature, a provision for the widow in the will carried with it the presumption that it was in lieu of dower, and that it had to appear plainly by the will itself that it was in addition to dower, in order that the widow might take both. See Ter. Stats. 1839, p. 184; section 18, ch. 62, R. S. 1849; section 18, ch. 89, R. S. 1858. By the last statute, when the widow was entitled to an election she was deemed to have elected to take under the will, unless, within one year after the death of her husband, she commenced proceedings for the assignment or recovery of her dower, or by some other unequivocal and notorious act waived the provision made for her. *Zaegel v. Kuster*, 51 Wis., 31; *Wilber v. Wilber*, 52 Wis., 298.

Where the widow made a valid election waiving the provisions of the will in her favor, or relinquishing any jointure or pecuniary provision made for her benefit, but without her assent, she was then entitled to be endowed of the lands of her husband in which her dower had not been barred. But whether it was necessary for her to renounce the provision made for her where the testator left real estate not disposed of by the will, in order to be endowed of such intestate real estate, is a question of some difficulty under the statute; but its solution is not essential to the disposition of this case. It is admitted that the law of 1858 and the prior statutes relate to real estate and to the claim of dower proper. These enactments had no application to personal property which was left undisposed of by the will. Therefore, unless the widow was excluded by the will itself from claiming a share in such personal estate, she took her portion under the statute of distri-

Hardy and another vs. Scales and others.

bution (subdivision 6, sec. 1, ch. 99, R. S. 1858), without being compelled to make her election. *Kempton's Case*, 23 Pick., 163. This was the state of the statutory law upon this subject when chapter 106, Laws of 1877, was enacted. And the question in this case relates solely to the construction of that act. The first section of the act amends section 17, ch. 89, R. S. 1858, and provides that the widow shall make her election whether she will take any jointure or pecuniary provision made for her without her assent, "or the share of his estate hereinafter provided." The second section amends section 18 of the same chapter, and enacts that when any lands are devised to the widow, or other provision is made for her in the will of her husband, she shall make her election whether she will take the lands "so devised, or the provision so made," or "whether she will claim the share of his estate provided in the next section; but she shall not be entitled to both unless it plainly appears by the will to have been so intended by the testator."

The third section amends section 19 so as to read as follows: "When a widow shall be entitled to an election under either of the last two preceding sections, she shall be deemed to have elected to take such jointure, devise or other provision, unless within one year after the death of her husband she file in the court having jurisdiction of the settlement of his estate, notice in writing that she elects to take the provision made for her by law, instead of the provision made for her by such jointure or other provision or devise; and upon filing such notice she shall be entitled to the same rights as to dower in his lands, and the same rights as to the homestead, as though he had died intestate, and shall, in addition thereto, be entitled to claim and receive the same share of his personal estate as though he had died intestate: provided, however, that nothing herein contained shall entitle any such widow to claim or receive from the estate of her deceased husband, in any of the foregoing cases, any greater share or part of or interest in his

Hardy and another vs. Scales and others.

estate than her rights of dower in his lands, her rights to the possession of the homestead during her widowhood, and one-third part of his net personal estate."

Now the learned counsel for the plaintiffs insist that this statute amounts to a complete revision of the law in respect to the rights of the widow in the estate of her husband who dies testate as to any of his property, having made provision for her in his will. He claims that its language is plainly applicable both to real and personal estate, and excludes the widow from any share or portion of such estate undisposed of by the will, where she does not renounce the provision made for her by the testator. Consequently, he says, as the widow in this case gave no notice of her election to take what was allowed her by law, presumably she chose the provision made for her in the will, and is not entitled to any share or portion of either the real or personal estate left undisposed of by the testator, but is limited to that estate or interest specifically given her in the will. We are inclined to the opinion that this view of that enactment is correct and must prevail. It seems to us difficult to hold, without nullifying its language, that it has nothing whatever to do with the descent or distribution of intestate property, and does not prescribe the rules when the widow is put to her election. Under the old statute she was to make her election whether she would take the provisions in the will, or whether she would "be endowed of the lands of her husband." Under the law of 1877 she is required to elect whether she will take the lands devised to her, or other provision made for her benefit, "or whether she will claim the share of his estate provided" in the third section. She cannot claim both the provision and such share or portion, "unless it plainly appears by the will to have been so intended by the testator."

The change in the language of the statute, compelling the widow to elect whether she would "be endowed with the lands of her husband," or whether she would "claim the share of

Hardy and another vs. Scales and others.

his estate," is quite significant. Upon her giving written notice that she elected to take the provision made for her by law, instead of the provision made for her by any jointure, or other provision or devise, the law declares that she will be entitled to the same rights as to dower in his lands, and the same rights as to homestead, as though he had died intestate; and, in addition thereto, should be entitled to claim and receive the same share of his personal estate as though he had died intestate; but in no event could she claim any greater share or part of or interest in his estate than her dower rights, her rights to the possession of the homestead during her widowhood, and one-third part of his net personal estate. It seems to us this language effectually repels the inference that the legislature, by the law of 1877, intended only to amend the sections of chapter 89, R. S., referring to dower, and shows that it was intended to apply to the distribution of intestate personal property.

It is objected that this construction makes the law of 1877 operate to repeal by implication subdivision 6, sec. 1, ch. 99, R. S. 1858; and we think it does have that effect. It seems to us the two statutes cannot well stand together in a case where the widow is put to her election. According to this view the widow, *Mahala Scales*, not having made her election, is not entitled to dower in any of the real estate of which her husband died seized, which was not disposed of by the will; nor is she entitled to any portion of the intestate personal property. The judgment of the circuit court giving construction to the will must therefore be affirmed.

By the Court.—Judgment affirmed.

Knight vs. Leary.

KNIGHT vs. LEARY.

February 10 — March 14, 1882.

EJECTMENT. (1) *No adverse possession against government.* (2, 3) *Proof of entry of land at land office.* (3, 4) *Unexplained alteration of entry.* (5) *Force of recitations in patent as evidence.* (6) *Acquiring additional land, under homestead law, without residence thereon.* (7) *Alienation by deed before issue of patent.* (8, 9) *Notary's certificate of acknowledgment of foreign deed of Wisconsin land.* (10) *Mala fides in purchase.* (11) *Evidence that grantee holds land in trust.*

1. No adverse possession of land is operative against the government.
2. If the record in the office of a register of deeds of a county in this state, of a certified copy of the record of a U. S. land office in the state, is evidence of the entries of land therein stated, still such record will be controlled by a certified copy of such land office records, introduced in evidence, and showing error in the registry.
3. The evidence in this case, in reference to the original entry by C. of land under a land warrant, including the certificate of the location of such warrant, issued by the land office at the time, the proper monthly abstract of locations made at said office, and the patent issued by the United States upon such entry — *held* to show conclusively that the entry did not cover the land here in dispute, notwithstanding a subsequent unexplained alteration of the entry upon the books of the office, and the record of the entry as so altered in the office of the register of deeds of the county.
4. In the absence of evidence explaining the alteration in such entry, or showing that C. ever purchased, paid for or located the land here in dispute, or acquired any interest therein from the government, the alteration is *held* inoperative for any purpose.
5. Where a patent of land from the United States recites that the patentee's claim thereto "has been established and duly consummated in conformity to law," and that the instrument was issued pursuant to certain specified acts of congress, it must be *presumed that such recitals are true*, if there is any method by which, consistently with the law and the facts in proof, a valid entry of the kind could have been made by the patentees.
6. Under the act of congress approved April 4, 1872 (now found as sec. 2306, R. S. of U. S.), any person of certain described classes who had theretofore entered, under the homestead law, a quantity of land less than 160 acres, was permitted to enter enough additional land to make up the full quantity of 160 acres, *without residing* upon such additional tract.

Knight vs. Leary.

The tract here in question being only forty acres, and plaintiff's grantor having received a patent therefor containing the recitals above described, and being shown never to have resided upon said land, it is presumed (in the absence of evidence to the contrary) that he acquired a right to enter it under the acts just mentioned.

7. One who has entered land under the homestead law may alienate it before the patent issues, in the absence of anything in the statute forbidding such alienation; and the patent, when issued to him, will vest the title in his previous grantee by deed of warranty.
8. The certificate of acknowledgment of a deed is no part of its execution; and sec. 10, ch. 86, R. S. 1858, as amended by ch. 183 of 1859, did not prescribe the form of a certificate of acknowledgment of a deed executed out of the state before a notary public, or require it to be made in accordance with the laws of the place where it was made; and such a certificate is sufficient where it would have been in substantial compliance with the laws of this state if made here.
9. Where, therefore, a deed of substitution by an attorney in fact to convey land, was acknowledged before a notary public in the District of Columbia, and the notary's certificate failed to recite, as required by the laws of congress then in force in said district, that the grantor named in the deed was well known to him, or that his identity was proved, etc.: *Held*, that the certificate was sufficient.
10. The mere purchase of land with knowledge that a person is in possession claiming title adverse to that of the vendor, in good faith, and has paid for the land, is not a fraud in the law.
11. In ejectment against A., the fact that B. paid for the land when the deed was made to A., without proof that the deed was so taken by A. without the consent or knowledge of B., is no evidence that A. holds the land in trust for B. or his heirs.

APPEAL from the Circuit Court for *La Fayette* County.

Ejectment, to recover the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 27, township 2, range 3 east, in the county of La Fayette. Complaint in the usual form. The answer of the defendant contains, *first*, a general denial; *second*, an averment that the defendant holds the legal title to the land claimed in trust for the widow and three minor children (naming them) of Timothy Leary, deceased, who are in possession of the land; and *third*, an averment that there is a defect of parties defendant, in that the said widow and her children are not made parties to the action. The answer also contains a counterclaim, in which it

Knight vs. Leary.

is alleged that the defendant, his grantors, and the beneficiaries for whom he holds the land in trust, have been in the peaceful adverse possession continuously from 1852 to the present time under claim of title founded upon an entry from the United States, and of absolute deeds of conveyance duly of record in the register's office of the proper county, all of which was well known to the plaintiff before he acquired the pretended title under which he claims the land.

It is further alleged that in 1878 the plaintiff, conspiring with persons unknown to the defendant, and with intent to cheat and defraud the defendant and said prior purchasers and beneficiaries, fraudulently obtained and placed on record in said county a deed of such land; also, that with like knowledge, conspiracy and intent, the plaintiff, in 1879, fraudulently made an entry of and procured a patent for the land from the United States, and placed the same on record in said register's office. The relief demanded in the counterclaim is, that the pretended entry, patent and deed be adjudged fraudulent and void as against the defendant and said beneficiaries; that the same be cancelled and annulled; and that the defendant be adjudged the owner of the land in trust as aforesaid. A reply denying the allegations contained in the counterclaim was interposed by the plaintiff. The undisputed evidence given on the trial proves that when the action was brought the defendant was in the possession of the land claimed, and that he held such possession under a deed executed by one Doty and his wife in 1865, purporting to convey the land to him in fee; also that Timothy Leary paid the consideration expressed in the deed, and occupied the land until his death in 1873. After his death the defendant cultivated the land, and from time to time delivered or paid to the widow of Timothy Leary portions of the proceeds thereof. Neither the plaintiff nor any person through whom he claims title to the land, was ever in the possession of it. The evidence of title is stated in the opinion. The circuit judge directed the jury to find for

Knight vs. Leary.

the defendant, and they returned a verdict accordingly. The plaintiff appealed from the judgment entered pursuant to the verdict.

For the appellant there was a brief by *Orton & Osborn*, and oral argument by *Mr. Orton*. They argued, *inter alia*, that the acts of congress giving homesteaders who have entered homesteads less in quantity than 160 acres, the right to enter enough of the unappropriated public domain, in addition to the quantity already entered by them, to equal 160 acres in all, does not require any residence by the homesteader on such additional homestead. The government has so construed the law, and has adopted the practice of issuing a homestead certificate to claimants proving themselves entitled to such additional homestead, which the claimant may locate upon the unappropriated public domain any where, without regard to possession of it. Act of May 20, 1862, 12 Stats. at Large, 392; Act of April 4, 1872, 17 Stats. at Large, 49; Act of June 8, 1872, 17 Stats. at Large, 333; Act of March 3, 1873, Laws of 1872-3, 605; R. S. of U. S., sec. 2306. The entry in this case was made under such an additional homestead certificate. The patent is conclusive evidence of title in the patentee against the government and all persons not showing a prior or paramount right to the title from the government. *Field v. Seabury*, 19 How., 332; *Johnson v. Townsley*, 13 Wall., 72; *Shepley v. Cowan*, 1 Otto, 331; *Moore v. Robbins*, 6 id., 530; *Parkison v. Bracken*, Burnett, 13. The patent is evidence that all the incipient steps have been regularly taken. *Schnee v. Schnee*, 23 Wis., 377. Though the power and deed bear date anterior to the patent, yet the title of Nance under the patent inures to his grantees, under the covenants in the deed. Rawle on Covenants, 410. The substitution under the power was acknowledged March 13, 1878. Under the law as it then was, this acknowledgment before a notary public out of the state was sufficient. R. S. 1858, ch. 86, sec. 10, as amended by ch. 188, Laws of 1859.

Knight vs. Leary.

For the respondent there was a brief by *Henry S. Magoon* and *Arthur J. O'Keefe*, and oral argument by *Mr. Magoon*. They argued, among other things, that actual residence, improvement and cultivation by the claimant in person were necessary to the valid entry of a homestead; and that the homesteader had no power to assign his certificate of location or to sell or transfer his homestead right, prior to the patent, citing R. S. of U. S., secs. 2263, 2288, 2447.

LYON, J. The following facts relating to the title of the land in controversy are established by the proofs: December 1, 1852, one Jefferson Cutter, located military land warrant certificate No. 19,610 on 160 acres of land in section 27, township 2, range 3 east, in the county of La Fayette. This location was originally entered in the tract book kept in the proper local United States land office as being upon the E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, the S. W. $\frac{1}{4}$ of S. E. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of that section. The certificate of such location issued to Cutter by the register of such land office, and the monthly abstract for December, 1852, of such location, contain the same descriptions of the land thus located, as does also the patent issued by the United States to Cutter two years later. Subsequently to the making of the original entry in the tract book, the same was altered by erasing "southwest," where it last occurs in the description, and interlining over the same "northeast," so that the description of the last tract read "the southeast qr. of the northeast qr.," which is the land in controversy. When this alteration was made, by whom, under what circumstances, or by what authority, does not appear. The tract book remained in this altered condition until April 5, 1878, when it was again altered by restoring the original description of the lands located by and patented to Cutter.

At some time, probably intermediate the first alteration of the tract book and the last alteration thereof, a document, purporting to be a certified copy from the records of the United

Knight vs. Leary.

States local land office above mentioned, showing by whom each tract of land in the county of La Fayette was entered from the United States, was recorded in the office of the register of deeds of that county, in a volume known as the United States entry book. This record shows that on December 1, 1852, Jefferson Cutter entered the S. E. $\frac{1}{4}$ (160 acres), the N. E. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ and S. E. $\frac{1}{4}$ of N. E. $\frac{1}{4}$ (80 acres) of said section 27. The last description is the land in controversy.

The defendant put in evidence this record in the office of the register of deeds, and it is the only evidence in the case tending to show that Cutter, or any grantee of his, ever acquired title to the land from the United States. In January, 1864, Cutter and wife conveyed the land in controversy to one Doty, and in November, 1865, Doty and wife conveyed the same to the defendant. Both conveyances contain the usual covenants of seizin, and of warranty against incumbrances.

The plaintiff's claim of title is founded upon the following facts: January 10, 1878, one John Nance executed to Charles D. Gilmore a power of attorney, irrevocable, authorizing the latter to locate the additional homestead of Nance, under certain acts of congress, on the land in controversy, and to sell and convey the same for such sum as he might deem proper, and to execute deeds therefor in the name of Nance and wife, with or without covenants of warranty. The instrument also contains the usual power of substitution. By a writing indorsed on such power of attorney and dated March 13, 1878, Gilmore substituted Wendel A. Anderson in his place to execute the intendments of such instrument. On May 3, 1878, Nance and wife, by Anderson as their attorney in fact, conveyed the land in controversy to the plaintiff by deed of warranty containing all of the usual covenants. January 23, 1879, the United States patented the land to Nance. This patent is headed "Homestead certificate No. 3,871—application 7,816," and contains the following recital: "Whereas, there has been

Knight vs. Leary.

deposited in the general land office of the United States a certificate of the register of the land office at La Crosse, Wisconsin, whereby it appears that, pursuant to the act of congress approved 20th of May, 1862, 'to secure homesteads to actual settlers on the public domain,' and the acts supplemental thereto, the claim of John Nance has been established and duly consummated in conformity to law for the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 27," etc.

After the above general statement of the various conveyances and instruments affecting the title to the land in question, we proceed to consider and determine the questions presented in the record, and argued by the respective counsel.

I. The defendant's claim of title will first be considered. It is scarcely necessary to say that the alleged adverse possession of the land by the defendant and his grantors, or by Timothy Leary and his heirs, does not strengthen the defendant's claim of title; for no adverse possession is operative against the government. The defendant can be in no better position to assert title by virtue of an adverse possession for ten or twenty years, founded upon the deed from Cutter to Doty, and from Doty to himself, than he would have been had the land remained vacant and unoccupied until entered or located by Nance. The defendant's claim of title, therefore, is founded alone upon the record in the office of the register of deeds of La Fayette county of the alleged transcript from the United States land office, which shows on its face that the land in controversy was entered by Cutter. It is supposed that there is some statute which authorizes this record, and makes it competent evidence, although we have not been referred to it, and have been unable to find it. No objection for incompetency was made against the admission in evidence of that record, and it is assumed that it was properly admitted.

The date of the alleged entry by Cutter, contained in that record, and the fact that the entry covers portions of the same land upon which Cutter located his bounty land-warrant, sat-

Knight vs. Leary.

isfactorily show that the transcript so recorded was intended to be a transcript from the tract book in the land office of Cutter's location of his land warrant No. 19,610. By the introduction of the certified copy of the tract book, the transcript recorded in the office of the register of deeds is proved erroneous in several particulars. Of course the entries in the tract book must control when it is made to appear that the recorded transcript therefrom is inaccurate. But, in respect to the land in question, the recorded transcript is a correct copy of the tract book as the same was after the first alteration thereof, above mentioned, had been made. Hence the effect of that alteration upon the title must be determined. The evidence leaves no room to doubt that Cutter located his warrant upon the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 27, and not upon the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of that section, which is the land in controversy. Undoubtedly such was the original entry in the tract book. This is abundantly, indeed conclusively, proved by the descriptions in the certificate of location issued at the time, in the monthly abstract, and in the patent issued to Cutter.

In the absence of any proof explanatory of the alteration, or that Cutter ever purchased, paid for or located the land, or that the government has done any act tending to show that it ever conferred upon Cutter any right to or interest therein, but conveyed other lands to him pursuant to the original entry and certificate of location, it must be held that the alteration is inoperative for any purpose, and hence that neither Cutter nor the defendant, who claims under him, ever had any title to, or legal or equitable interest in, the land in question.

II. But it is settled that the plaintiff in ejectment must recover, if at all, upon the strength of his own title, and not upon the want of title by his adversary. This rule requires us to determine whether the plaintiff has established title in himself.

First. It was proved that Nance, the original patentee and

Knight vs. Leary.

the grantor of the plaintiff, never occupied the land. As nearly as can be gathered from the record, the learned circuit judge held that occupancy by Nance was essential to a valid location of the land under the homestead laws, and for want of it the patent was held invalid, and a verdict for the defendant directed.

It is provided in the homestead laws (U. S. R. S., 424, sec. 2305), that "no patent shall issue to any homestead settler who has not resided upon, improved and cultivated his homestead for a period of at least one year after he shall have commenced his improvements." The circuit judge held that this provision is decisive against the validity of the patent. The patent issued to Nance recites that his claim thereto "has been established and duly consummated in conformity to law," and that it was issued pursuant to the act of congress approved May 20, 1862, "to secure homesteads to actual settlers on the public domain," and the acts supplemental thereto. It is manifest that if there is any method by which a valid entry of the land, under the recited acts, could have been made without actual occupancy, in the absence of any proof to the contrary, it must be presumed that the above recitals are true; that such method was adopted in the present case; and that the patent is valid.

Section 2 of the act of congress entitled "An act to enable honorably discharged soldiers and sailors to acquire homesteads on the public lands of the United States," approved April 4, 1872, is as follows: "Any person entitled, under the provisions of the foregoing section, to enter a homestead, who may have heretofore entered under the homestead laws a quantity of land less than 160 acres, shall be permitted to enter, under the provisions of this act, so much land as, when added to the quantity previously entered, shall not exceed 160 acres." 17 Stats. at Large, 49.

By another act, approved June 8, 1872, the section was amended to restrict the additional entry to land "contiguous to the tract embraced in the first entry." 17 Stats. at Large,

Knight vs. Leary.

333. But by another act, approved March 3, 1873, the restriction was removed by a restoration of the original section above quoted, and it now stands as section 2306 in the revision. We understand the effect of these acts to be, that in the cases mentioned in section 2306 the additional entry may be made of any of the public domain subject to private entry, without regard to contiguity or occupancy. It would be absurd to require the homesteader who had already resided upon, improved and cultivated, say 120 acres of land, and thereby established his right thereto, to go through the same process on the additional 40 acres which he desires to obtain under section 2306, before he can obtain it. The statute has enacted no such absurdity, but is content with a residence upon and the cultivation and improvement of one parcel of the 160 acres, if it be in separate parcels. This view, we understand, accords with the practice of the land department of the government. Indeed, it is not perceived how any other practice could be upheld under the statutes.

Here, then, we have a method by which Nance could have obtained a valid patent of the land from the government without an actual occupancy of the land. It was stated on the argument, and not denied, that the land was entered by Nance under the provisions of section 2306, and there are things in the record which corroborate the statement. But, however that may be, inasmuch as there is nothing in the evidence to negative it, it must be presumed, in support of the patent and the recitals therein, that it was so entered. It must therefore be held that the patent to Nance is valid, and conveyed the whole title of the government.

Second. We are now to examine the title claimed by the plaintiff. The deed from Nance, under which the plaintiff claims, was executed before the patent was issued. The learned counsel for the defendant argues that the deed was void for that reason. He has not cited any statute which in terms prohibits alienation before the patent issues, but insists

Knight vs. Leary.

that the spirit of the homestead laws is opposed to it, and that, in the absence of express statutory authority to alienate, the right does not exist. We are unable to concur in these views. Without entering into an extended discussion of the subject, it is sufficient to say that the law does not favor restraints upon alienation, and nothing short of a positive provision to that effect will justify the court in holding that a statute imposes such restraints. Finding no such provision, we must hold that Nance might alienate the land before the patent issued.

The patent issued to him, but his conveyance to the plaintiff, theretofore executed, was by a warranty deed with full covenants. Applying a very familiar principle to the case, the absolute title in fee-simple which the patent conveyed to Nance vested at once in the plaintiff by virtue of his deed, unless such deed is invalid for another reason, now to be considered.

Third. The power of attorney executed by Nance and wife to Gilmore was executed under their hands and seals in the state of Missouri, was attested by two witnesses, and duly acknowledged before a justice of the peace of that state. It has attached to it the certificate of authentication required by the Revised Statutes of 1858, ch. 86, sec. 10, then in force in this state. The execution, acknowledgment and authentication are in substantial compliance with the provisions of sections 9 and 10 of that chapter, and undoubtedly conferred upon Gilmore the powers specified in the instrument, one of which was the power of substitution.

The instrument by which Gilmore sought to substitute Anderson to execute the powers so conferred by Nance and wife upon him, was executed in due form in the District of Columbia, under the hand and seal of Gilmore, and was also attested by two witnesses. It was acknowledged by Gilmore before a notary public, who affixed his official seal to his certificate. The body of the certificate of acknowledgment (omitting:

Knight vs. Leary.

venue, signature and seal) is as follows: "On this 13th day of March, 1878, personally came Charles D. Gilmore and acknowledged the above assignment made by him to be his free act and deed, before me." No certificate of authentication is attached to the instrument. The law of congress in force in the District of Columbia requires the officer taking the acknowledgment of a conveyance of land to certify in the certificate of acknowledgment (or rather to recite) that the grantor named in the deed is well known to him, or that his identity was proved by the oaths of credible witnesses. Stats. at Large relating to District of Columbia, 52, sec. 441. See also *Smith v. Garden*, 28 Wis., 685; 5 Stats. at Large, 226, ch. 57.

It is claimed that the certificate of acknowledgment to the instrument of substitution is fatally defective in that it is not in accordance with the law of the District of Columbia, and hence that the instrument conferred no power upon Anderson, the substitute named therein, to execute the deed to the plaintiff as the attorney in fact of Nance and wife. The conclusive answer to this proposition is, that the certificate of the acknowledgment of a deed is no part of its execution, and the statute then in force (section 9, ch. 86, R. S. 1858) did not require that such certificate should be in any particular form. True, in certain cases the next section (chapter 86, sec. 10) required a certificate of the clerk or other certifying officer of a court of record, stating, among other things, that the instrument was acknowledged as well as executed according to the laws of the state, territory or district in which the acknowledgment was made; but instruments acknowledged before a commissioner appointed for that purpose by the governor of this state were expressly excepted from the operation of section 10, and to such instruments no such certificate of authentication was required. Section 10 was amended by chapter 188 of 1859, and the exception was extended to include instruments acknowledged before a notary public. The corresponding section in Taylor's Statutes (page 1144) refers

Knight vs. Leary.

to the law of 1859, but through mistake the amendment is not incorporated in the compiled section.

The statute prescribes no particular form of a certificate of acknowledgment, where the acknowledgment is taken before such commissioner or a notary public, nor does it provide that such acknowledgment must be made in accordance with the laws of the place where made. It seems to have been, and we think was, the intention of the legislature, clearly manifested in the above-mentioned statutes, to provide that an acknowledgment taken before either of those officers, and the certificate of such acknowledgment, should be sufficient if the same complied substantially with our laws, even though it might not comply with the laws of the state or district where the same was made. Any other construction would fail to give effect to the exceptions in section 10, and in the amendatory act of 1859. Had the instrument of substitution in the present case been acknowledged in this state, the certificate thereof would undoubtedly have been sufficient. It follows from the view we have taken of the statutes in that behalf, that it is sufficient although made in the District of Columbia.

The present Revised Statutes amend the former statutes by providing that in all cases where deeds are executed out of this state they may be acknowledged in the form prescribed by our statute, and the form of certificate of the clerk of a court of record required by section 10 is changed and adjusted to such provision. R. S., 637, secs. 2218, 2219. The revisers say, in their note to section 2218, that the amendment is made "to supply an omission in the statute not probably generally known to exist." However, the revision makes no change in the law in respect to the manner of acknowledgment and the form of the certificate thereof, when the same is taken before a notary public. In such a case it merely expresses what was necessarily implied in the old statute.

It results, from the propositions above considered and deter-

Knight vs. Leary.

mined, that the plaintiff is the owner in fee of the land claimed, and entitled to recover the possession thereof in this action.

We have considered this branch of the case on the hypothesis that a valid acknowledgment of the instrument of substitution is essential to the plaintiff's title. It is not here determined whether this hypothesis is or is not correct.

III. There is a general averment of conspiracy and fraud in the counterclaim, but no particular facts are stated therein in support of the averment, except that the patent of the land to Nance was obtained from the United States, and the land conveyed to the plaintiff by Nance, when the plaintiff knew that it had previously been entered by the defendant's grantor, had been conveyed to the defendant, and was occupied by him. The proofs are no broader than the averment. It may be that the purchase of the land by the plaintiff, when he knew that the defendant, or his brother Timothy, had bought the land and paid for it supposing that he had a good title to it, was a harsh proceeding. It is not for this court to approve or disapprove it. The justice or injustice of the act is a matter for the consideration and determination of the plaintiff, and not for this court. His purchase of the land when he knew that another was in possession claiming title adversely to him in good faith, does not render the plaintiff's purchase fraudulent. Hence there is no element of fraud in the case affecting the plaintiff's title.

IV. The defendant answered in abatement the non-joinder as defendants of the widow and heirs of Timothy Leary, who paid the consideration for the land when the deed thereof was given by Doty and wife to the defendant. The circuit court evidently ruled against the defendant on this answer, for the verdict and judgment are in bar, and not in abatement. The ruling was correct. Although it appears that Timothy Leary paid for the land, there is no proof that such deed was taken by the defendant in his own name without the knowledge or consent of Timothy, or in violation of any trust. All reason-

 Parkinson vs. McQuaid.

able inferences from the testimony are to the contrary. In the absence of such proof, no trust relation between the defendant and Timothy, or his heirs, appears. As the proofs stand, had the title passed to the defendant under the deed from Doty and wife to him, his title would have been absolute as against Timothy and his heirs. R. S. 1858, ch. 84, secs. 7, 9. Hence, in no contingency had the widow and heirs of Timothy any such interest in the land as rendered them necessary parties in an action concerning it.

It is believed that the foregoing observations dispose of all material questions in the case. It results therefrom that the judgment of the circuit court must be reversed, and the cause will be remanded for a new trial.

By the Court.—So ordered.

 PARKINSON VS. MCQUAID.

February 10 — March 14, 1882.

CONSTRUCTION OF DEED: EVIDENCE: VERDICT. (1) *Fundamental rule of construction.* (2) *Rule applied: when a fixed monument (as a post), named in description, must yield to other parts of description.* (3) *Evidence of agreement of parties to abide by a survey.* (4) *Instructions to jury.* (5) *Surplusage in verdict.*

1. The fundamental rule in the construction of deeds is to so construe them as to give effect, if possible, to the grantor's intention.
2. A deed described the boundaries of the land thereby conveyed as "beginning at the N. W. corner" of a certain forty; running thence south a certain distance to a certain line, thence east along said line twenty chains; thence north a certain distance to a post; thence west twenty chains; thence south to the place of beginning, containing a specified number of acres. The grantor did not own any land west of the west line of said forty, but did own the land twenty chains in width east of said line, of the north and south length described in the deed. A survey of the tract conveyed was made at the time of the deed, which was supposed by the parties to be correct, and a partition fence was built by them along what was then supposed to be the east line of said tract. In

Parkinson vs. McQuaid.

making such survey, the surveyor and the parties *intended to make* the N. W. corner of said forty the starting point. The tract so described and surveyed contains the exact *amount* of land named in the deed. Three years later, the grantee removed the fence several rods farther east, claiming that to be the true eastern boundary of his land. In an action by the grantor against him for such removal as a trespass, *Held*:

(1) That the facts and circumstances above stated were admissible in evidence to aid in construing the deed.

(2) That upon those facts it appears clearly to have been the intention of the parties to convey and take the amount of land named from lands belonging to the grantor lying wholly east of the west line of said forty; and the boundaries of the tract conveyed must be determined by taking the *true* northwest corner of said forty as the starting point, and following the calls of the deed, even though the east line as thus located should lie *wholly east of the post* named in the deed.

(3) That where there were several surveys made, which purported to start from the northwest corner of the forty, and gave different eastern boundary lines, it was for the jury to determine which was the true survey of that line.

3. Where a boundary line was in dispute, the parties interested executed an agreement, which declares that they "hereby agree to abide by the survey now being made by Messrs. A., B. & C." *Held*, that the agreement was valid, and, after the same had been put in evidence, it might further be shown by oral evidence to what line the agreement refers, that the survey therein mentioned was made and agreed to by all the surveyors, that afterwards the contracting parties all expressed themselves satisfied with the result, and that one of the parties to the suit thereupon gave the other possession in accordance with such survey.
4. The jury were instructed that, if they were unable to say from the proof that there was a greater reason for believing one way than the other as to where the line actually was, they might still settle the rights of the parties, so far as this case was concerned, outside of the question where the line actually was. But the context shows this to have meant merely that they might find for the defendant if they found that plaintiff consented to the removal of the fence, and that, failing to find such consent and being unable to determine from the evidence where the true line was, they might presume it to be where the parties first agreed that it was when the fence was built, and so might find for the plaintiff. *Held*, no error.
5. A verdict that the jury find "for the defendant, that he was not guilty of the trespass complained of," adds that they "establish the line as made by A., B. & C., and that each party pay his own costs of suit." *Held*, that it was properly treated as a mere general verdict for the defendant, the remainder being disregarded.

Parkinson vs. McQuaid.

APPEAL from the Circuit Court for *LaFayette* County.

The case is thus stated by Mr. Justice TAYLOR:

"This was an action for a trespass upon real estate, and for taking and removing a fence therefrom. The answer was a general denial, and that the *locus in quo* was owned in fee by the defendant. The whole contention in the case depends upon where the east line of the defendant's land is located. The evidence shows that in 1875 the defendant purchased from the plaintiff seventy acres of land, partly situated in the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 30, and partly in the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 31, in township 4 north, range 4 east. In the deed the land is described as follows: 'Beginning at the N. W. corner of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 31, in township 4 north, range 4 east; running thence south eighteen chains to the line of Peter Parkinson, Jr., and N. T. Parkinson; thence east along said line twenty chains; thence north thirty-five chains and thirty-seven links to a post; thence west, 1 deg. and 25 min. south, 20 chains; thence south sixteen chains and eighty-four links to the place of beginning; containing 70 21-100 acres of land.'

"The evidence given on the trial shows that the plaintiff, at the time the deed was given, did not own any land west of the west line of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 31, nor west of the west line of the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 30; and it also shows that he did own the land twenty chains in width extending east of both of said lines, and of the length described in said deed. It also shows that a survey of the tract deeded was made at the time the deed was made, which was at the time supposed to be correct by the parties, and that a fence was built by the parties along what was then supposed to be the east line of the tract. It also appears that in making said survey the surveyor and the parties intended to make the starting point the N. W. corner of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 31, township 4, range 4. The fence was supposed

Parkinson vs. McQuaid.

by the parties to be the real line until 1878, when the defendant questioned its correctness, and afterwards, and before this action was commenced, a new survey was made, and the east line of the seventy acres was claimed by the defendant to be four rods further east than the fence, and he removed the fence to the new line so claimed by him, and such removal is the trespass complained of."

The other facts bearing on the case are stated in the opinion.

The defendant had a verdict and judgment, and plaintiff appealed from the judgment.

For the appellant there was a brief by *Orton & Osborn*, and oral argument by *Mr. Orton*. They contended, *inter alia*: 1. The survey of 1875 started from a point which had been acquiesced in by both parties for more than twenty years as the N. W. corner of the N. E. quarter of the N. W. quarter of section 31; and in the deed they used language which, as they supposed the facts to be, properly described that point. It subsequently transpired that, in consequence of a misapprehension of facts, the language used did not properly describe such starting point. But the point remained certain, and should control notwithstanding the erroneous description resulting from the mutual misapprehension of facts. See *Messer v. Oestreich*, 52 Wis., 689. 2. Even if the starting point of the survey is not to govern in fixing the west boundary of the tract conveyed, still the post referred to in the deed at the northeast corner of the tract must fix its eastern boundary. This post stood at the northeast corner of the fence, as originally built in 1875, and is positively identified. Whatever is most certain in a description or boundary must prevail over what is less certain. A monument, or any marked point which can be identified, is absolutely certain, and must prevail over courses and distances or quantity. Willard on Real Est. & Con., 405; *Wendell v. People*, 8 Wend., 183; *Pernam v. Wead*, 6 Mass., 131; *Alshier v. Hulse*, 5 Ohio,

Parkinson vs. McQuaid.

584; *Reid v. Langford*, 3 J. J. Marsh., 420; *Doe v. Thompson*, 5 Cow., 371; *Lampe v. Kennedy*, 49 Wis., 602; *Wright v. Day*, 33 id., 260; *Marsh v. Mitchell*, 25 id., 706.

For the respondent there was a brief by *J. R. & D. S. Rose* and *M. M. Strong*, and oral argument by *Mr. Strong*.

TAYLOR, J. One of the contested questions in the case is as to the construction of the deed. It is insisted by the learned counsel for the appellant, that the post referred to at the end of the third course and distance, being a monument whose location is fixed by the evidence, must limit the defendant's land on the east, whether it be twenty chains east of the west line of the plaintiff's land as owned by him at the time of the deed or not; and that, for the purpose of locating the land according to the description in the deed, the starting point for making the survey should be such post, and then the survey should be traced backwards, and its bounds be so fixed; and that all other descriptions in the deed must give way to this one. We do not think the post referred to in the deed can have the effect claimed for it by the learned counsel for the appellant.

The fundamental rule for the construction of a deed, whether it relates to the description of the land, the estate conveyed, or other matter, is to so construe it as to give effect, if possible, to the intention of the parties. *Johnson v. Simpson*, 36 N. H., 91; *B., N. Y. & E. Railroad Co. v. Stigeler*, 61 N. Y., 348; *Jackson v. Dunsbagh*, 1 Johns. Cases, 91; *Jackson v. Myers*, 3 Johns., 388; *Church v. Steele*, 42 Conn., 69; *Wright v. Day*, 33 Wis., 260; *Bridge v. Wellington*, 1 Mass., 219; *Worthington v. Hylyer*, 4 Mass., 196; *Lane v. Thompson*, 43 N. H., 320; *Reed v. Proprietors of Locks, etc.*, 8 How. (U. S.), 274; *Jackson v. Moore*, 6 Cow., 706; *Drew v. Drew*, 8 Foster, 495; *Tyler's Law of Boundaries*, 121; *Wolfe v. Scarborough*, 2 Ohio St., 361; *Peyton v. Ayres*, 2 Md. Ch., 64.

Parkinson vs. McQuaid.

To arrive at the intention of the parties, the facts and circumstances before the parties at the time may be given in evidence, so far as they can without trespassing upon any of the rules of evidence. *Drew v. Drew*, 8 Foster, 494; *Webb v. Stone*, 4 Foster, 286; *Reed v. Proprietors, etc.*, 8 How., 274.

Considering the fact that the plaintiff did not own the land west of the west line of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 31; that the starting place of the description of the land in the deed is the northwest corner of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 31; that he did own the lands east of that line at least twenty chains in width; and that the length of the north and south lines of the land conveyed are stated to be just twenty chains, and the length north and south is such as to enclose exactly 70 21-100 acres of land,—it seems to us that it was the clear intention to convey to the defendant that exact amount of land, and to convey it in the form described in the deed, making the west line of the land conveyed the west line of the plaintiff's land. Such was clearly the intention of the parties, as shown by the description in the deed, aided by the evidence showing that the plaintiff did not own any land west of the starting point in the west line of the lands described. Had the evidence shown that the plaintiff owned the land west of the starting point and west line of the land described in the deed, as well as east of the east line, then a survey and location made by the parties at the time the deed was given would be strong evidence that the land so surveyed and located was the land intended to be conveyed, although the starting point had been the same as described in this deed.

In such case the court would probably hold that the description of the starting point in the deed must yield to that adopted by the parties at the time. The fact that the intention was to convey 70 21-100 acres is strongly evidenced by the fact that the survey and location made on the ground at the time the deed was given contained just that amount of land; the mistake being, if any mistake was made, in the loca-

Parkinson vs. McQuaid.

tion of the starting point in that survey. That the parties intended that the N. W. corner of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 31 should be the starting point in the survey is evident from the fact that the surveyor testifies that he intended to start his survey at that point. There was no intention to include in the survey made any lands not owned by the plaintiff. It appearing that it was the clear intention of the parties, the one to sell and convey, and the other to purchase 70 21-100 acres of land in the form described in the deed, lying east of the west line of the plaintiff's land, the material question in the case is to ascertain the true west line of the plaintiff's land at the time he gave the deed, and when that is done the land must be laid off twenty chains in width, extending east from that line, and of the length stated in the deed.

In *Powers v. Jackson*, 50 Cal., 429, it was held that, if a deed describes the land conveyed by adopting a corner of a subdivision according to the United States survey as a starting point, said corner is a monument and will control, although the party selling at the time of the sale, by an actual survey, fixed the stake at a different point and ran the lines accordingly. In *Verplank v. Hall*, 27 Mich., 79, it was held that, when the initial point in the description of premises in a deed is the southeast corner of the south half of the southeast quarter, fractional, of a section, and a quarter is made fractional by a meandered lake so situated as to cover the eastern and central portions thereof, and the parcel described was carved out of the north half within a year after the same was patented, the southeast corner in question is construed to be the point which constituted the southeast corner of the land when it was surveyed out and patented; and the fact that the waters of the lake have since receded cannot change the boundaries of the lands described, as previously located. This court, in the case of *Gove v. White*, 20 Wis., 425, held in substance the same rule. In that case the starting point was described as a certain section corner, and it was held that such

Parkinson vs. McQuaid.

starting point must control the other descriptions. *Wendell v. People*, 8 Wend., 182; *Du Pont v. Davis*, 30 Wis., 170-177.

In this last case it was held that where the starting point was a quarter-section corner, it was a controlling circumstance in ascertaining the boundary of the lands conveyed. Where lands are conveyed and described as bounded by the lands of another in the deed, the true boundary line between the lands of such other and the grantor is the boundary, although at the time of the conveyance a part of the land conveyed according to such true boundary was enclosed by such other person and claimed to be owned by him. *Sparhawk v. Bagg*, 16 Gray, 583. See, upon same point, *Umbarger v. Chaboya*, 49 Cal., 526; *Cornell v. Jackson*, 9 Met., 150; *Cleveland v. Flagg*, 4 Cush., 76; *Caswell v. Wendell*, 4 Mass., 108. If the adjoining land-owner had acquired title by adverse possession to the land within his enclosure at the time of the conveyance, this rule would not apply.

In the case of *Cleveland v. Flagg*, *supra*, it was held "that where land is conveyed beginning at and bounding on the land of P., the point of beginning and boundary is the true line of P.'s land, and not the line of P.'s occupation as shown by a fence set up and maintained by P. before and after the conveyance, with the consent of the owner of the lot conveyed, under the mistaken belief that such was the true line."

In *Cornell v. Jackson*, *supra*, it was held "that where A. conveys land to B., bounded on land of T., the true line of T.'s land is the boundary of the land conveyed, although A. and T. had previously agreed by parol on a different line, and had set up stakes to mark such line, and had afterwards held possession of their respective lands according to such lines; and if B. be evicted from the land lying between the true and the agreed line, he has no remedy on A.'s covenant of warranty, unless A., at the time of the conveyance, pointed out the agreed line as the true one."

Parkinson vs. McQuaid.

These cases, we think, clearly establish the rule that where the starting point in a deed is a known and ascertained point, or one which can be ascertained and fixed upon the ground by proper examinations or surveys, the true place of such starting point is the one referred to in the deed, and not a point which may have been supposed, at the time of making the conveyance, to be such point, unless such starting point has, either by agreement of the parties owning the adjacent lands, or by adverse claim of some of the parties, been changed from its true location.

As was said above, there can be no doubt that the intention of the parties to the conveyance in question in this case was to make the true N. W. corner of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 31 the starting point in making the survey of the lands described in the deed; and the fact that they made a mistake in its location in making an actual survey, does not in the least tend to disprove such intention; it rather strengthens it, by showing that they did at the time make an effort to find such true point. The facts that the starting point was a fixed point, capable of ascertainment with at least some degree of certainty; that the plaintiff intended the west line of the tract conveyed to be the true west line of the land owned by him at the time; and that he intended to convey a tract twenty rods in width east of his true west line,—make such starting point a monument which must control, rather than the stake at the end of the third course placed at the time the deed was made. This view of the case is further strengthened by the subsequent acts of the plaintiff as well as those of the defendant. He does not appear at any time to have denied that he intended to convey 70 21-100 acres of his land to the defendant, nor does he allege that the N. W. corner of the land conveyed had been fixed and agreed upon as the true corner by reason of the survey made at the time the deed was given. He seems to admit that the N. W. corner of the land conveyed is the true N. W. corner of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 31, and the

Parkinson vs. McQuaid.

whole controversy between the parties is the location of such true corner.

Two surveys of the premises were made by apparently competent persons, and both the surveys differ from the survey made at the time the deed was made. One carries the east line of defendant's land about two rods, and the other four rods, east of the line fixed by the survey made at that time, and upon which east line the fence removed by the defendant was originally placed. The defendant moved the fence to the line four rods east of its former location. There was certainly evidence sufficient to justify the jury in finding the line to which the fence was removed the true east line of the defendant's land, and this court cannot disturb such verdict upon any questions of fact in the case. The jury were the proper persons to determine which of the surveys given in evidence was the true survey of the boundary line.

The learned counsel for the appellant contends that the judgment ought to be reversed for errors in the admission of evidence, and in the instructions given by the learned circuit judge to the jury, and because the verdict of the jury was erroneous in form. The exceptions to the admission of evidence nearly all arise upon the introduction of two written agreements in regard to a survey of said line. The following are copies of the agreements:

(1) "We have agreed to meet on the fifteenth of May at Felix's, and agree upon one or more surveyors to test the survey of Mr. Pool; to be equal in the expenses of doing it.

[Signed]

"P. PARKINSON, JR.,

"FELIX BURGESS,

"P. F. MCQUAID,

"JOSEPH VAN METER."

(2)

"FAYETTE, June 17, 1878.

"We, the undersigned, hereby agree to abide by the survey now being made by Messrs. Brown, Gray and Pool, as between

Parkinson vs. McQuaid.

us four, and also agree to bear an equal proportion of the expense occasioned by the making of the same.

"Signed this 17th day of June, 1878.

"PETER PARKINSON, JR.,

"FELIX BURGESS,

"P. F. MCQUAID,

"JOSEPH VAN METER."

These writings were offered in evidence by the defendant, and the plaintiff objected to their reception. The last was offered in evidence first, and was objected to by the plaintiff as irrelevant and immaterial, and because the contract was void under the statute of frauds. The objections were overruled, and the plaintiff excepted. The defendant then offered to show by parol what survey was being made by said Brown, Gray and Pool at the time the contract was made, for the purpose of showing that among other matters the survey then being made was a survey of the east line of the defendant's land. This evidence was objected to by the plaintiff on the ground "that the written contract, if valid, must show what lines were to be established by the survey, and that parol evidence was inadmissible for that purpose." The other evidence objected to by the plaintiff was offered and received for the purpose of showing whether the survey made was agreed to by all the surveyors; whether, when the survey was completed, the parties to the contract expressed themselves satisfied with the result; and whether, after the survey was made, the plaintiff gave the defendant possession of the land in dispute.

We think there was no error in admitting the evidence objected to. The written contract signed on the 17th of June is not void because it does not give a specific description of the lines to be surveyed, and which the parties agreed to adopt as final between them. The parties agree to abide by the survey then being made by certain designated persons. The reference to the survey then being made is not so indefinite as to render the contract void. That is sufficiently certain which

Parkinson vs. McQuaid.

can be made certain by proof, without violating the rule which excludes parol evidence which adds to or changes the written contract. It is not more uncertain than a contract for the sale of a house now in process of building by A. B. for the parties to the contract. Such contract is sufficiently specific in its description if at the time the contract was signed A. B. was in fact building a house for the parties, and such house would be the house meant in the contract. The parol proof in such case does not add anything to the written contract, but it simply applies it to the subject referred to therein. See 1 Greenl. Ev., §§ 286-288, where the admissibility of such evidence is discussed fully and the authorities referred to, showing that it is competent to introduce parol evidence of any extrinsic matter tending to show what person or persons, or what thing, was intended by the parties to the contract, or to ascertain their meaning in any other respect, without any infringement of the rule that parol evidence cannot be given to add to or contradict a written contract. This doctrine is commented upon and approved by this court in *Lyman v. Babcock*, 40 Wis., 503, 512, and *Messer v. Oestreich*, 52 Wis., 684.

We are inclined to hold that such written contract would bind the parties as to all lines then being surveyed by the persons named therein, unless the contract was repudiated by one or more of the parties thereto before the full completion of the surveys made in pursuance thereof. The contract and completed survey made in pursuance thereof would amount to the practical settlement and location of a disputed boundary line between the parties, and, being in writing, would bind the parties thereto. In some of the states it is held that even a parol agreement to locate a disputed boundary will bind the parties after it has been located and acted upon by them. See the cases cited in *Kellogg v. Smith*, 7 Oush., 379, 381. In this case there is no necessity for determining that question, and we do not.

The other exceptions to the evidence are clearly not well

Parkinson vs. McQuaid.

taken, and were not in fact urged by the learned counsel for the appellant.

The counsel for the appellant takes exceptions to each instruction given by the learned circuit judge to the jury. After carefully considering the instructions given, we are satisfied that such of the instructions as relate to the effect which should be given to the written contract between the parties as to the survey were sufficiently favorable to the plaintiff, and that in those instructions no errors were committed which prejudiced him.

The learned counsel for the appellant lays considerable stress upon his exception to the following instructions given by the learned circuit judge: "If the jury are unable to say from the proof that there is a greater reason for believing one way than the other as to where the line is, they may still settle the rights of the parties, so far as this case is concerned, outside of the question where the line actually is." It may be admitted that this instruction, standing by itself, might be subject to some just criticism; but when taken in connection with the rest of the charge to the jury, it can hardly be said to have been erroneous or to have prejudiced the plaintiff. In the very next sentence the judge says that unless the proof establishes the true line to be different from where the parties located it themselves in 1875, then the defendant ought not to have interfered with or removed the fence unless he was licensed to do so by the plaintiff. And further on in his charge he again says to the jury: "If you are unable to determine from the evidence where the dividing line is, and are unable to say that the fence stood on the defendant's land, you are to presume it was rightfully where the parties first agreed to place it. In that case the plaintiff is entitled to recover for removing the fence, unless you find that the plaintiff consented to its removal." The instructions, as a whole, give meaning to the words excepted to, viz., "they may still settle the rights of the parties, so far as this case is concerned, outside of the

Parkinson vs. McQuaid.

question where the line actually is." In the first place they may settle the case in favor of the defendant if the proofs satisfy them that the plaintiff gave the defendant license or consented to the removal of the fence; and second, if they do not find that the defendant had license to remove the fence, and they are unable to determine from the evidence where the true line is, they may presume it was where the parties first agreed it was when the fence was built, and in that case they should find for the plaintiff. Upon the evidence the question of license was properly submitted to the jury, and the last-quoted direction to find for the plaintiff if, from the conflicting evidence of the surveyors, they were unable to determine where the true line was, was clearly favorable to the plaintiff; and in both events they should determine the case without determining where the true line was. As a whole, we are unable to say that the instructions were erroneous, or prejudiced the rights of the plaintiff.

The form of the verdict should not, we think, work a reversal of the judgment. The jury found generally in favor of the defendant, not guilty of the trespass complained of. When they had found that, they had discharged their duty, and the addition that they "established the line as made by Messrs. Brown, Gray, and Pool, and that each party pay their own costs of suit," was mere surplusage, and the court properly directed the clerk to enter the verdict as a general verdict for the defendant. Neither party nor the court having directed the jury to determine specially where the true boundary line between the parties was, they had no right to embody that finding in their verdict, and the law determines which party shall pay the costs.

By the Court.—The judgment of the circuit court is affirmed.

The President, etc., of the Village of Platteville vs. McKernan.

**THE PRESIDENT, ETC., OF THE VILLAGE OF PLATTEVILLE VS.
McKERNAN.**

February 11—March 14, 1882.

MUNICIPAL ORDINANCES: Selling liquors without license. (1) *When prosecution cannot appeal in action for violation of municipal ordinance.*
(2) *Charter provisions superseded by general law.*

1. When a city or village ordinance prohibits that which is a crime or misdemeanor and punishable at common law or by statute, and prescribes a penalty for its violation by fine, with imprisonment on default of payment, the action to recover such penalty is *quasi* criminal, and cannot be brought to this court on the plaintiff's appeal.
2. The general law of this state on the subject of licensing the sale of intoxicating liquors, and making their unlicensed sale punishable as a misdemeanor (first enacted as ch. 179 of 1874), operated to repeal the provisions of then existing municipal charters upon that subject, excepting in the three particulars expressly excepted by the statute, to wit: the disposal of license moneys, the term of license and the jurisdiction of municipal courts.

APPEAL from the Circuit Court for Grant County.

The plaintiffs appealed from a judgment in favor of the defendant.

The case is stated in the opinion.

For the appellants there was a brief by *W. H. Beebe*, their attorney, with *Carter & Cleary*, of counsel, and oral argument by *Wm. E. Carter*.

For the respondent there was a brief by *Bell & Murphy*, and oral argument by *Mr. Bell*

ORTON, J. This is an action of debt to recover the penalty prescribed by an ordinance of said village, passed January 20, 1879, for selling intoxicating liquors without first having obtained a license therefor, according to the provisions of said ordinance restraining the sale of such liquors and requiring such license. The authority for passing an ordinance on this subject is found in the charter of said village in subd. 2 of

The President, etc., of the Village of Platteville vs. McKernan.

section 22, ch. 63, P. & L. Laws of 1861, which gives to the president and trustees of said village the power "to restrain any person from vending, giving or dealing in spirituous, intoxicating, alcoholic, malt, mixed, fermented or vinous liquors, unless duly licensed by them." Objection was made to the introduction of any evidence under the complaint, because it did not state facts sufficient to constitute a cause of action, and such objection was sustained and the action dismissed, and this appeal is from such judgment of dismissal.

The first question to be considered is the appealability of this judgment. It is contended by the learned counsel of the respondent, that it is not appealable, because it is a *quasi* criminal action. With other authorities cited, we are referred to a late decision of this court in the case of the *City of Boscobel v. Bugbee*, 41 Wis., 59, which appears to be in point. The city appealed from the judgment of the circuit court dismissing the action on the ground that the plaintiff had failed to comply with the terms of a continuance of the cause. The action was brought to recover the penalty prescribed by an ordinance of the city, made "for the protection of the public peace," and the complaint was for "fighting and threatening to fight." It was held in that case, in the language of the present chief justice, that "the action being *quasi* criminal, it could not be brought to this court by appeal;" that "the statute regulating and governing appeals to this court refers to civil actions only;" and that "the decisions upon the bastardy act are strictly in point on this question of practice;" citing *State v. Mushied*, 12 Wis., 561, and *State v. Jager*, 19 Wis., 235. The charter of that city provided that on the non-payment of the fine and costs for the violation of ordinances of that kind, the defendant should be imprisoned in the county jail until such fine and costs were paid. In that case it will be observed that the acts complained of as a violation of the city ordinance constituted an assault and battery, or an assault, both at common law and by statute, and the

The President, etc., of the Village of Platteville vs. McKernan.

penalty was fixed by statute. So, in this case, the act complained of as a violation of the village ordinance was also a misdemeanor and punishable by statute; and by the ordinance, in default of the payment of the judgment for the penalty, or any part thereof, the defendant was to be imprisoned in the common jail not exceeding thirty days. These analogies are sufficient to show that there is no distinction between the two cases in any respect affecting the appealability of the judgment.

This appeal must, therefore, be dismissed by the authority of that case. But it is proper to say that neither that case nor this goes any further than to decide that where a city or village ordinance prohibits that which is a crime or misdemeanor, and punishable at common law or by statute, and prescribes a penalty for its violation by a fine, and, conditionally, imprisonment, the action to recover such penalty is *quasi* criminal, and cannot be brought to this court by appeal on behalf of the plaintiff.

Two very important questions were very ably discussed by the learned counsel on both sides, — one of which was, whether it is within the province of a municipal corporation to pass ordinances upon the same subject matter of criminal statutes, with the same or different penalties; and the other, whether the general laws of the state on the subject of licensing the sale of intoxicating liquors, and making the sale thereof without license punishable as a misdemeanor, repeals by implication the existing provisions of city and village charters embracing the same matters, as a revision of the whole subject. The first question is one of too much importance, and subject to too great a conflict of authority, to be decided in a case not appealable to this court, and when the decision might be regarded as *obiter*. The other question has been so frequently decided by this court that it is not an open one for discussion, when the analogy between this case and those decided so clearly appears. The general law, chapter 179,

The President, etc., of the Village of Platteville vs. McKernan.

Laws of 1874, clearly operated to repeal all of the provisions of city and village charters then existing on the subject of licensing the sale of intoxicating liquors, and of the punishment for selling the same without license, by being a complete revocation of the whole subject. The title of the act is expressive of this design: "An act to consolidate and codify the various laws of our state relating to excise and the sale of intoxicating liquors."

Section 23 makes such design still more apparent by providing that "the provisions of this law shall apply to the whole state and every part thereof," with only three distinct exceptions: (1) Towns, cities, and villages may dispose of the license moneys as they see fit. (2) Cities and villages may fix the term for which any licenses shall be granted. (3) The act shall not interfere with or change the jurisdiction of any municipal or police court. These exceptions, by force of the maxim *expressio unius exclusio alterius*, clearly imply the repeal of all other provisions not thus excepted. This general law makes the selling of intoxicating liquors without license a misdemeanor, punishable by a fine of not less than ten nor more than forty dollars, besides costs, or in lieu of such fine by imprisonment in the county jail of the proper county not exceeding sixty days, nor less than twenty; and in case of the non-payment of the fine and costs forthwith, the defendant is to be imprisoned in said jail until such fine and costs are paid, or until discharged by due course of law.

The charter of the village is in conflict with the general law in other respects relating to this subject.

The following authorities in this court are conclusive of this question: *Brightman v. Kirner*, 22 Wis., 54; *Lewis, Gov., v. Stout*, id., 234; *Burlander v. Mil. & St. P. Railroad Co.*, 26 Wis., 76; *Moore v. Superior & St. Croix Railroad Co.*, 34 Wis., 174; *Oleson v. Green Bay & L. P. Railway Co.*, 36 Wis., 383; *Bohlman v. Green Bay & M. Railway Co.*, 40 Wis., 157; *Fire Dept. of Oshkosh v. Tuttle*, 48 Wis., 91.

 Lord vs. Devendorf, imp.

In passing upon this question we may adopt the language of the opinion in *Boscobel v. Bugbee*, *supra*: "We felt it our duty to briefly express our views upon the question discussed by counsel, although the appeal must be dismissed for the reason just given."

By the Court.—The appeal is dismissed.

 LORD VS. DEVENDORF, imp.

February 11 — March 14, 1882.

GENERAL ASSIGNMENT: ATTACHMENT. (1) *What provisions in assignment invalidate it.* (2) *Assignment by one partner of his individual property.* (3) *Evidence of intent to defraud.* (4) *What attachment plaintiff must show on traverse of his affidavit.* (5) *Reversal of decision of court below, on weight of evidence.*

1. A provision in a general assignment for the benefit of creditors, that the assignee "shall, with all convenient diligence, sell and dispose of the property at public or private sale, as he may deem most beneficial to the interests of the creditors of [the assignor], and convert the same into money," does not authorize the assignee to sell on credit, and does not invalidate the assignment. *Hutchinson v. Lord*, 1 Wis., 294, and *Keep v. Sanderson*, 2 id., 42, distinguished.
2. One member of a firm may assign his individual property so as to prefer his individual creditors to the creditors of the firm.
3. An intent to defraud cannot be inferred from the mere fact that a debtor made a general assignment for the benefit of creditors, or that he preferred some of his creditors to others, or that he turned out property in payment of certain creditors after an attachment had been levied in favor of another creditor, and before executing his general assignment.
4. While an attachment issues on an affidavit of a proper person that he has good reason to believe certain facts, yet, on traverse of the affidavit, the attaching creditor has the burden of showing *those facts themselves*.
5. There was in this case no such clear preponderance of evidence against the finding of facts by the court below (in favor of the assignment) as would warrant this court in reversing the decision of that.

APPEAL from the Circuit Court for *Grant County*.

The defendants, *Devendorf* and Penn, being in partnership and doing business as merchants at Platteville, dissolved April

Lord vs. Devendorf, imp.

9, 1877; *Devendorf* purchasing of Penn the undivided one-half of the building wherein they were then doing business, for \$3,000, which was secured to be paid by *Devendorf* assuming \$1,000 of Penn's share of the incumbrances on the building, and giving Penn his notes for \$2,000, secured by mortgage on the undivided one-half of the store building. *Devendorf* also purchased of Penn his undivided one-half of the stock of goods, wares and merchandise in their store, and the tools and stock in their tin shop, at the then present cost price, for which he paid \$2,500 down, and for the balance gave his notes in installments of \$500 each. The notes and accounts due the firm were left with *Devendorf* for collection, with Penn's assistance, and the proceeds were to be applied, as fast as collected, in the payment of the firm debts, until they should be fully paid, and then the balance was to be divided or otherwise disposed of as they should agree. They also made mutual transfers of certain other articles. *Devendorf* continued the business in the same store until March 15, 1880, when this suit was commenced to recover the amount of two notes executed by *Devendorf* and Penn, January 4, 1878, and an attachment was issued therein, and the stock of goods in the store of *Devendorf* taken thereon. March 16, 1880, being the next day after the levy of the attachment, *Devendorf* made a general assignment for the benefit of his creditors, of all and singular his property, real and personal, and things in action (not exempt from execution); and the assignee therein was directed to sell the same and convert it into money, and out of the proceeds thereof (after paying reasonable expenses, costs, charges, and his own lawful compensation) to pay his debts in the order therein named; first, what are therein designated as class number 1; and second, what are therein designated as class number 2. The grounds stated in the affidavit for the attachment were, that the plaintiff had good reason to believe, and verily did believe, that *Devendorf* and Penn had assigned, conveyed or disposed of, or concealed, or were about to assign, convey or dispose of their property, with intent to defraud

Lord vs. Devendorf, imp.

their creditors, and that the plaintiff had good reason to believe, and verily did believe, that *Devendorf* had removed, or was about to remove, some of his property out of the state, with the intent to defraud his creditors. *Devendorf* and Penn severally traversed the affidavit for the writ, and on the trial by the court a large amount of testimony was taken, whereupon the court found for the defendants, and an order was entered accordingly. This was an appeal from so much of that order as vacated and dismissed said writ of attachment as to the defendant *Devendorf*.

For the appellant there were separate briefs by *Bell & Murphy* and *P. A. Orton*, and oral argument by *Mr. Bell* and *Mr. Orton*. They argued, among other things, that no dissolution of any kind affects the rights of firm creditors without their consent, and that all the joint property of the firm is just as liable for the joint debts after such dissolution or settlement among themselves as it was before. *Parsons on Part.*, 395; *Collyer on Part.*, § 121; *Menagh v. Whetwell*, 52 N. Y., 162-165. An assignment for the benefit of creditors, made by one of a late firm, is fraudulent and void upon its face, if it authorizes such a disposition to be made of the property conveyed, or of its proceeds, as will, if carried into effect, deprive the firm creditors of having the firm property applied to the payment of their claims. *Burrill on Assignments*, §§ 338-351; *Jackson v. Cornell*, 1 Sandf. Ch., 354; *Wilson v. Robertson*, 21 N. Y., 587-591; *Lester v. Abbott*, 28 How. Pr., 488; *Johnson v. Thoeatt*, 18 Ala., 744; *Jenners v. Doe*, 9 Ind., 464; *Goodrich v. Downs*, 6 Hill, 438; *Cunningham v. Freeborn*, 3 Paige, 537; *Dunham v. Waterman*, 17 N. Y., 9; *Green v. Trieber*, 3 Md., 39; *Inloes v. Am. Ex. Bank*, 11 id., 183; *Rosenberg v. Moore*, id., 380; *Johnson v. McAllister's Assignee*, 30 Mo., 327. *Devendorf* delivered not only his individual assets, but all of the firm assets in his possession or under his control, to the assignee, absolutely, for the purposes of the assignment. *Wyckoff v. Carr*, 8 Mich., 44; *Oliver v.*

Eaton, 7 id., 108; *State v. Benoist*, 37 Mo., 515; *Bigelow v. Stringer*, 40 id., 206. An assignment void in part as against the provisions of the statute, is void *in toto*, and no interest whatever passes to the assignee as against creditors who do not consent to it. *Wakeman v. Grover*, 4 Paige, 37; *Flanigan v. Lampman*, 12 Mich., 58; *Hathaway v. Brown*, 18 Minn., 425. As to whether the assignment authorized a sale of the property on credit, and was therefore void as tending directly to hinder and delay creditors, they cited *Norton v. Kearney*, 10 Wis., 443; *Keep v. Sanderson*, 12 id., 352.

For the respondent *Devendorf* there was a brief by *Carter & Cleary*, and oral argument by *Mr. Carter*.

CASSODAY, J. In our opinion the assignment is not void upon its face by reason of the following clause: "shall, with all convenient diligence, sell and dispose of the same at public or private sale, as he may deem most beneficial to the interests of the creditors of said party of the first part, and convert the same into money."

In *Hutchinson v. Lord*, 1 Wis., 294, the particular words which rendered the assignment void were: "In such manner, either at public or private sale, *and upon such terms and for such prices*, as to the said party of the second part shall seem advisable;" and those which further expressly exempted the assignee from all liability, "*while acting in good faith*." The court in that case put particular stress upon the words in italics.

In *Keep v. Sanderson*, 2 Wis., 42, the words which avoided the assignment were: "To sell and dispose of the assigned property *upon such terms and conditions* as in their judgment may appear best and most to the interest of the parties concerned."

In *Norton v. Kearney*, 10 Wis., 443, it was held that "an assignment in which the assignee is 'to dispose of the property to the best advantage, in his discretion,' is valid, and does not

Lord vs. Devendorf, imp.

imply an authority to sell on credit." Dixon, C. J., distinguishing that case from *Hutchinson v. Lord* and *Keep v. Sanderson, supra*, said: "We are of the opinion that the discretion here vested must be understood as a legal discretion; that is, a discretion to be exercised within the limits which the law fixes in such cases. There is ample room for the exercise of this discretion without transcending any rule of law." The second case of *Keep v. Sanderson*, 12 Wis., 352, turned upon the same language as the first, and was decided the same way, and the opinion clearly distinguishes it from *Norton v. Kearney*. The above cases are harmonized by RYAN, C. J., in his dissenting opinion in *Bound v. Railroad Co.*, 45 Wis., 574, 575.

In the case before us there is nothing said about "terms and conditions," nor "prices," but the assignee is required to sell and dispose of the property and convert the same into money with all convenient diligence, and such sale and disposition is to be "at public or private sale," as he may deem most beneficial. The thing thus left to his discretion is, whether he will sell at *public* or *private sale*, and not whether he will sell for cash, or on credit or otherwise. The assignment does not purport to cover the property of the old firm of Devendorf & Penn, but only the property of *Devendorf*. It is true that the accounts and debts due the old firm were, subsequently to the assignment, scheduled in Exhibit D, but no such exhibit appears to be referred to in the assignment. Whether the assignee can take any interest in the assets of the old firm to the prejudice of the creditors of the old firm, is a question not here presented, as no such assets appear to have been attached. It would seem that "the rule of equity is uniform and stringent, that the partnership property of a firm shall all be applied to the partnership debts, to the exclusion of the creditors of the individual members of the firm, and that the creditors of the latter are to be first paid out of the separate effects of their debtor, before the partnership creditors

Lord vs. Devendorf, imp.

can claim anything." *Jackson v. Cornell*, 1 Sandf. Ch., 348. See also *Kirby v. Schoonmaker*, 3 Barb. Ch., 46; *Nicholson v. Leavitt*, 4 Sandf. S. C., 307; *S. C.* reversed, 2 Selden, 510; *Wilson v. Robertson*, 21 N. Y., 587; *Forbes v. Scannell*, 13 Cal., 242; *Nye v. Van Husan*, 6 Mich., 329.

The mere fact that there were firm assets and firm creditors did not, however, prevent *Devendorf* from assigning his property and preferring his individual creditors to the firm creditors. In the absence of any statute to the contrary, there can be no question but that an insolvent debtor may pay one creditor in money or property in preference to another. *Spring v. Ins. Co.*, 8 Wheaton, 268. This right of the debtor to prefer results from the absolute ownership of property. *Brashear v. West*, 7 Pet., 608. This absolute ownership implies the absolute right of disposition. In the absence of the bankrupt law or any statute to the contrary, there can be no doubt but that an insolvent debtor, when assigning his property for the benefit of his creditors, may, in good faith, prefer one or more to others. Such being the law, it follows that an intent to defraud cannot be inferred from the mere fact of *Devendorf* making a general assignment for the benefit of his creditors, nor from the mere fact that in such assignment he preferred some of his creditors to others, nor from the mere fact that he turned out property in payment of certain of his creditors after the levy of the attachment and before the execution of the assignment. Section 2731, R. S., authorizes a writ of attachment to issue, even though the plaintiff or person making the affidavit in his behalf only had "good reason to believe" one of the things therein mentioned; but where it is traversed, and the same is tried by the court under sections 2745-6, R. S., the affirmative of the issue is upon the plaintiff. In such a case, the finding of the circuit court against the plaintiff as to the existence of the fact itself will not be disturbed unless there is a clear preponderance of the evidence against it. *Rice v. Jerenson*, ante, p. 248; *Davidson v. Hackett*, 49 Wis., 186.

Lord vs. Devendorf, imp.

Such being the established rule of law, it only remains for us to consider whether there is such clear preponderance of evidence in this case. True, it appears from the evidence that *Devendorf* put off the plaintiff's attorney from day to day for some weeks by mere promises, which it would seem he had little or no expectation, and probably no present capacity, of fulfilling; but that of itself does not establish fraud. So it appears that he had for some months prior to the assignment contemplated going to the Red river country, in Dakota, and there going into farming, and that he had for that purpose acquired several horses and other property suited to the business. If at the time he fully comprehended and properly appreciated the amount of his indebtedness, and the real value of his property, it is difficult to perceive how he could expect to pacify his creditors sufficiently to make such a change without their interference. True, the mere change of locality would not of itself establish an intent to defraud, although it might be a circumstance strongly tending to evince a purpose to hinder and delay creditors in the collection of their debts; and if it had been shown in addition that the purpose was to take advantage of more liberal exemption laws, and to convert property not exempt into property which was exempt, the inference of the intent to defraud his creditors would be irresistible. But such is not the evidence. Besides, the purpose of going to the Red river country was no secret; on the contrary, it had for several months been talked about by *Devendorf* in the store, and frequently in the presence of large numbers of the citizens of Platteville, and must have been generally known in the neighborhood. The more charitable view would be that *Devendorf* was inefficient as a business manager, and, having good credit, heedlessly, and without comprehending his true financial circumstances, allowed himself to drift into the condition in which he was subsequently found. Whatever may be the real motive, we are constrained to hold that there is not such a clear prepon-

Messersmith vs. Devendorf, imp., etc.

derance of the evidence of an intent on the part of *Devendorf* to defraud his creditors as would warrant this court, under the rule already established, to reverse the order and set aside the finding of the court below.

By the Court.—The order of the circuit court is affirmed.

MESSESMITH vs. DEVENDORF, impleaded, etc.

Lord v. Devendorf, ante, followed.

APPEAL from the Circuit Court for *Grant* County.

This case was argued with the foregoing, and by the same counsel, being similar in its history in the court below, and having come here on appeal from a similar order.

CASSODAY, J. The facts in this case are the same as in that of *Lord v. Devendorf, supra*, except that the note, which is the basis of the suit and the attachment, was executed December 11, 1874, and the attachment was levied while the assignment was being drawn. But these differences do not, in our view of the law, change the result. For the reasons given, therefore, in *Lord v. Devendorf*, the order of the circuit court in this case must be affirmed.

By the Court.—Order affirmed.

The Town of Scott vs. The Town of Clayton.

THE TOWN OF SCOTT VS. THE TOWN OF CLAYTON.

February 11 — March 14, 1882.

REVERSAL OF JUDGMENT: (1) *For misleading instructions.*COURT AND JURY. (2) *When question of fact not to be submitted to jury.*

1. Upon a second trial of this cause, the circuit judge stated to the jury his own view of the law, which had been overruled by this court on a former appeal (51 Wis., 185); but afterwards directed the jury to disregard his opinion, and determine the question at issue from the evidence as applicable to the law. This court, being of opinion, from the whole record, that this statement of the law as previously held by the circuit judge may have misled the jury, treats it as error.
2. The court having submitted to the jury a question of fact conclusively determined by the evidence, in which there was no conflict, this is also held to be error.

APPEAL from the Circuit Court for *Crawford* County.

Action to recover the sum of \$20.72, with interest, for medical attendance and other relief furnished by the plaintiff town in September, 1878, to Mrs. Sarah Enyart and her three infant children, who are alleged to have been paupers residing and having a settlement in the defendant town, and to have been found in a destitute and suffering condition in the plaintiff town. A former appeal herein is reported in 51 Wis., 185-196. On the second trial a judgment was rendered in favor of the defendant, from which the plaintiff appealed.

For the appellant there was a brief signed by *D. Webster*, and a second brief signed by *Brooks & Dutcher* and *D. Webster*, and oral argument by *Mr. Webster* and *Mr. Brooks*.

For the respondent there were briefs signed by *Wm. H. Evans* and *Thomas & Fuller*, and oral argument by *Mr. Fuller* and *Mr. Evans*.

COLE, C. J. Quite a number of exceptions were taken on the trial of this cause to the rulings of the trial court in admitting or excluding evidence, which are relied on here as

The Town of Scott vs. The Town of Clayton.

a ground for reversing the judgment. But we shall not stop to inquire whether these exceptions are well founded or not, for we are satisfied there should be a new trial on account of some things in the charge which were excepted to, and which were calculated to prejudice the case of the plaintiff in the minds of the jury. In submitting the case, the learned circuit judge made some remarks on the decision of this court on the former appeal, stating wherein he differed from this court in the construction of the statute applicable to the case. In making these comments we are satisfied that the learned judge merely intended to explain his reasons for ordering the nonsuit on the former trial, and that he had no purpose of weakening the decision of this court by what he said. But, while this was the real object which he had in view, yet it is claimed by the plaintiff's counsel that his remarks were calculated to mislead the jury as to the law of the case.

It is said that the jury might well have supposed that they were to follow his construction of the statute rather than the one placed upon it by this court. In view of the verdict we certainly think there is ground for this objection, and that possibly the finding of the jury might have been otherwise had the learned judge contented himself with stating the law as laid down by this court. The learned judge told the jury, in substance, that he differed from this court in the construction of the statute in this: According to his view Mrs. Enyart had the right to voluntarily change her place of residence which she acquired by living with her husband, after she was divorced from him, by going back to the plaintiff town and living with her parents; and if, after going back to her father, she became destitute and needed mere temporary assistance, and the town in which she was voluntarily living gave her only such assistance, this would not prevent her voluntary residence out of the defendant town in the plaintiff town, for one year, from destroying her legal settlement in the defendant town; and that such temporary assistance by furnishing a doctor was far from

The Town of Scott vs. The Town of Clayton.

coming within the statute, which says that if any poor person shall become a charge for his support to any town, the one in which he has a settlement shall pay it.

It is hardly necessary to observe that this view as to the nature or amount of assistance which must be furnished Mrs. Enyart by the plaintiff town, in order to prevent her from acquiring a settlement in that town by her voluntary residence therein for a year, was essentially different from the one expressed by this court in the former opinion. 51 Wis., 186. And, indeed, the learned judge so in effect says, further on in the charge, where he tells the jury to disregard his opinion on the subject of Dr. Coats' assistance, and determine the question of pauperism from the evidence as applicable to the law. So that, if they should find that Mrs. Enyart and her children were paupers, and entitled to have medical assistance furnished by the direction of the town of Scott, and rendered by Dr. Coats, as a pauper, they should conclude that her voluntary settlement in the town of Scott was interrupted, and that she did not lose her residence in the town of Clayton. But while this charge, as finally given, was correct, still we do not think it would remove or destroy the effect of the learned judge's previous remarks as to his understanding of the law. Juries naturally look to the trial judge for a correct exposition of the law applicable to the case, and are more likely to be governed by his views in that regard than by the decisions of the appellate court, about which presumably they know nothing. Correct practice, therefore, requires the trial judge, if he instructs at all, to state the law so clearly and pointedly as to leave no reasonable ground for misapprehension or mistake on the part of the jury. There is good ground for saying that this was not done in this case, and that the remarks of the learned judge, made in the opening of his charge, were well calculated to prejudice the case of the plaintiff, as claimed by counsel.

Furthermore, the learned judge said to the jury that in

The Town of Scott vs. The Town of Clayton.

passing on the question of fact as to whether Mrs. Enyart and her children were paupers, and entitled to medical assistance at the time it was rendered by Dr. Coats, they must be satisfied from a preponderance of the evidence that she needed the assistance rendered, and was so poor and so circumstanced that she could not have procured the needed assistance without the intervention of the town authorities. After a careful examination of the testimony in the printed case, we do not find the least conflict on these questions of fact. All the testimony relating to these matters conclusively shows that Mrs. Enyart was a pauper; that she had no means of her own; that she was seriously ill in August, 1878, with bilious pneumonia, and greatly needed medical aid when it was rendered. About these facts there was no conflict, and nothing really for the jury to pass upon. Submitting these questions in this manner as though there was some doubt on the evidence as to whether Mrs. Enyart was a pauper, and really needed medical assistance when it was rendered by Dr. Coats, had a tendency to injure the plaintiff's case. For, as we have said, these facts were conclusively established, and there was no conflict in the evidence about them.

This controversy between the two towns as to which, under the circumstances, is liable for the support of Mrs. Enyart and her children if they were paupers and stood in need of relief, involves but a small amount of money, while it does involve principles of law of considerable practical importance. We think the questions of fact were not submitted in a proper way to the jury, and we therefore feel constrained to grant a new trial for that reason. The questions arising upon the construction of the statute were fully considered upon the former appeal, and the law applicable to the case then settled. Nothing further need be said upon those points.

By the Court.—The judgment of the circuit court is reversed, and a new trial ordered.

Hayes vs. Frey and others.

HAYES vs. FREY and others.

February 13 — March 14, 1882.

PRACTICE. (1) *Separate trials for several defendants: pendency of appeal by one defendant.* (2) *Discretion of court as to continuance.*

DEED: MARRIED WOMAN. (3) *Taking wife's acknowledgment.*

FORECLOSURE SALE without action: (4) *Must comply with statute.* (5) *Presumption in favor of sale.* (6) *Sale by foreign executor: what preliminary steps required.* (7) *Who takes the mortgage "by assignment."* (8) *Sec. 3267, R. S., considered.* (9) *Sale under power: statute of limitation.* (10) *Certificate of sale: misrecital as to time when deed issues; absence of a seal.* (11) *What officer executes deed.*

DEPOSITION: (12) *When taken before notary, how authenticated.*

1. Where one of several defendants has obtained a separate trial and judgment, and the action against him is pending on an appeal to this court, the court below may still proceed to try the action between the plaintiff and other defendants; and if the original pleadings are still on file here, the want of them may be supplied by furnishing copies for the use of the trial court.
2. The continuance of a cause for absence of witnesses is a matter within the discretion of the court.
3. Sec. 12, ch. 59, R. S. 1849 (which required a married woman's acknowledgment of a deed executed by her jointly with her husband to be taken separately, etc.), was repealed by sec. 2, ch. 229, Laws of 1850; and it was impliedly repealed as to all real estate conveyances made by a married woman of her separate estate, by sec. 3, ch. 44, Laws of 1850.
4. No valid foreclosure of a mortgage of land by virtue of a power of sale without suit expressed in the instrument, could be had under ch. 154, R. S. 1858, unless proceedings were taken in substantial compliance with that statute.
5. The party who, in subsequent litigation, relies upon a foreclosure sale under a power, is not bound to show in the first instance that no action or proceeding had been instituted at law to recover the mortgage debt; but one who seeks to invalidate the sale has the burden of proof in that respect.
6. The executor of a deceased mortgagee, acting under letters testamentary duly granted in another state, may execute a power of sale in the mortgage, of land in this state, without having the will probated here; and, prior to ch. 20 of 1869, he might do so without filing a copy of his letters testamentary in any public office in this state. *Hayes v. Lienlokken*, 48 Wis., 509, distinguished.

Hayes vs. Frey and others.

7. The executor in this case was also made by the will a residuary legatee, but there were special money bequests to other persons and no special bequest of the note and mortgage here in question to the executor. *Held*, that he took the property in the first instance as executor, and not by "assignment" within the meaning of ch. 154, R. S. 1858.
- [8. The effect of ch. 20 of 1869 (now sec. 3267, R. S.), somewhat considered by TAYLOR, J. But that statute was not in force when the proceedings by the executor here in question were had.]
9. The validity of a sale under a power in a mortgage is not affected by the fact that the statute of limitations had run upon the note secured by the mortgage.
10. The fact that the certificate of such a sale recited that a deed would not be issued until *two years* (instead of one) after the sale, does not invalidate a deed issued after the two years had expired; and a failure to attach a seal to the certificate is not a fatal defect.
11. Under sec. 12, ch. 154, R. S. 1858, the deed of land sold at such a sale may be executed either by the officer who made the sale and whose term has expired, or by his successor in office.
12. In case of a deposition taken without the state before a notary public, under sec. 4112, R. S., the certificate of such notary need not have attached thereto any certificate of his official character. Sec. 4203, R. S., has no reference to such depositions.

APPEAL from the Circuit Court for *La Crosse* County.

Ejectment, to recover the possession of real property in the city of *La Crosse*. The case is thus stated by Mr. Justice TAYLOR: "The plaintiff claims title to a tract of land, containing about $13\frac{1}{2}$ acres, described in the complaint as the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of sec. 5 of township 15 north, range 7 west, and known as lot 4 of Rublee & Gillett's addition to the city of *La Crosse*. The defendants claim in severalty separate lots in said addition, and served separate answers. They claim title under a mortgage given upon said tract of land by F. M. Rublee and Sarah W. Rublee, his wife — now *Sarah W. Hayes*, the plaintiff — to Linus H. Mooney of the county and state of New York, dated July 28, 1858, and duly recorded on the 26th of August following. The evidence for the plaintiff shows that she was seized in fee as the absolute owner of said land on the 6th day of October, 1856; and if

Hayes vs. Frey and others.

her title was ever divested, it was by virtue of the mortgage aforesaid, and certain proceedings taken to foreclose it, under the statute, by advertisement without action, by virtue of the power of sale contained in the mortgage. The principal controversy in the case arises upon these proceedings. On the plaintiff's part it is contended that the proceedings were void for irregularity, and did not divest the plaintiff of her title. Her counsel also raise a question upon the practice in this case, which they claim should reverse the judgment. One of the defendants to the action, John Lienlokken, who had answered separately, had also procured a separate trial, in which judgment had been rendered in favor of the plaintiff, which was affirmed on an appeal to this court. See 48 Wis., 509. When the action as between the plaintiff and the other defendants was called for trial, plaintiff objected to proceeding therein and asked for a continuance, first, upon the ground that the record in the action was in the supreme court, and had not yet been remitted to the circuit court; and secondly, on the ground of the absence of some of plaintiff's witnesses. The objection was overruled, and the motion denied." Other facts will appear from the opinion.

There was a verdict for each of the defendants; a new trial was refused; and plaintiff appealed from a judgment on the verdict.

For the appellant there was a brief signed by *M. P. Wing* and *G. C. Prentiss*, her attorneys, with *P. L. Spooner*, of counsel, and oral argument by *Mr. Wing* and *Mr. Spooner*. They contended, *inter alia*: 1. The court erred in admitting the sheriff's certificate of sale and sheriff's deed. The deed was not executed by the proper person. R. S. 1858, ch. 154, secs. 5, 12. The words "other person" in section 12 evidently refer to the "person appointed for that purpose in the mortgage" (sec. 5), but the words "officer or his successor in office" cannot be construed to apply to the officer after his term of office had expired. If the time of redemption expired during the offi-

Hayes vs. Frey and others.

cer's term, he might execute the deed, otherwise his successor in office should execute it. The certificate of sale was not under seal, and was therefore void, a seal being one of the requisites which no one had authority to dispense with. R. S. 1858, ch. 154, sec. 10. The fixing of the time of redemption at two years instead of one was another failure to comply with the law in an essential particular. If the party making the sale can fix the time of redemption, why have any law on the subject? If the time can be made two years, it can be made two days or twenty years. Nor can the court say that it is for the benefit of the mortgagor to have two years to redeem instead of one. It might affect the amount bid at the sale, or prevent bidders. There is no authority in law for such a sale. In statutory sales the law must be strictly pursued, or the sale is void. *Sherwood v. Beade*, 7 Hill, 431; *Cohoes Co. v. Goss*, 13 Barb., 137; *Thatcher v. Powell*, 6 Wheat., 119; *Denning v. Smith*, 3 Johns. Ch., 332. The person setting up title under foreclosure must show affirmatively the pre-requisites, and that the statutory proceedings have been complied with. And the defendants should have shown affirmatively that no action at law had been commenced to enforce their claim. 2. There was no evidence of any kind in the office of the probate court or elsewhere in this state, at the time of the pretended foreclosure, that the mortgagor was dead, or that the person signing the notice was executor. A foreign executor has no power to administer upon or dispose of the property of his testator in another state, unless authorized by the laws of that state, and then only in the manner prescribed by law. *Fenwick v. Sears' Adm'rs*, 1 Cranch (S. C.), 259; *Dixon's Ex'rs v. Ramsay's Ex'rs*, 3 id., 319; *United States v. Crosby*, 7 id., 115. 3. The deposition of Thomas C. Davis should have been excluded under the provisions of sec. 4203, R. S., which are mandatory. There is no evidence that the person who administered the oath was a notary public or authorized to administer oaths in the state of

Hayes vs. Frey and others.

New Jersey; and this is the only statute providing for administering an oath out of the state, to be used in the state. See *Ely v. Wilcox*, 20 Wis., 524. 4. The mortgage and note should have been excluded on the ground that the statute of limitations had run when the attempted sale was made. The debt being barred at that time, the power of sale was no longer effective, and the mortgagee should have resorted to a court of equity to enforce his lien against the mortgaged property. The mortgage did not purport to convey the title which was in Sarah W. Rublee, and the presumption is that she intended to convey only a dower interest. If she conveyed anything more, the acknowledgment should have been in the form prescribed by sec. 12, ch. 59, R. S. 1849, and not under ch. 229, Laws of 1850.

For the respondents there was a brief by *Cameron, Losey & Bunn*, and oral argument by *Mr. Bunn*. They argued, among other things: 1. The sale under the power was valid unless the proceedings were in violation of some express material provision of statute. Foreclosure in this method is as advantageous to the mortgagor as foreclosure by suit, and is to be looked on with favor. *Slee v. Manhattan Co.*, 1 Paige, 70; *Jackson v. Henry*, 10 Johns., 193; *Doolittle v. Lewis*, 7 Johns. Ch., 45; *Wilson v. Troup*, 2 Cow., 202. When this foreclosure took place, there was no statute requiring the executor to file a copy of his authority in the county court prior to commencing proceedings. Ch. 28, Laws of 1860, applies only to actions, and ch. 20, Laws of 1869, was not in force until three years after this foreclosure. Foreign executors gain no new title or authority by filing their letters here; they simply gain an evidence of title. Such filing is not jurisdictional, and the failure to file affords no defense, even in an action, unless it is pleaded in abatement. The objection is purely formal and technical, and the disability may be cured *pendente lite*. In this case the filing of a certified copy of the letters in the office of the county judge, after action brought,

Hayes vs. Frey and others.

removed the objection entirely. *Smith v. Peckham*, 39 Wis., 418; *Vincent v. Starks*, 45 id., 460; *Moir v. Dodson*, 14 id., 280; *Johnson v. Wilson*, 1 Pin., 65. But the proceeding by sale under a power stands on more favorable grounds than does a foreclosure by suit. The power expressly authorizes a sale by the executor or administrator of the mortgagee, and it was competent for the mortgagor to grant that power to the foreign administrator. The whole foreclosure proceeding is extra-judicial. A foreign executor may collect and discharge debts from residents of this state; he may seize the testator's personal property in this state. He has authority to foreclose and sell real estate as executor without qualifying in this state, and without any evidence of his executorship being furnished to our courts. This has been the settled law for over fifty years in New York, whence we derive our statute. *Doolittle v. Lewis*, 7 Johns. Ch., 46; *Demarest v. Wynkoop*, 3 id., 129. The objection that the certificate of sale is not under seal, is purely technical. The statute (sec. 10, ch. 154, R. S. 1858) is directory to the officer, and designed for the protection of the purchaser. In the mouth of a subsequent purchaser in good faith, it would be an objection, but it cannot avail the mortgagor. Neither can he be heard to complain that it gives him too long a time to redeem. As an evidence of title and of the sale it is superseded by the issuing of the deed, and thereafter plays no part. R. S. 1858, ch. 154, secs. 12, 18, 20. The sheriff's deed was properly executed by the former sheriff. Sec. 12, ch. 154, R. S. 1858, seems clearly to warrant such an execution of the deed, and it is peculiarly proper in this case where the sheriff acts not so much officially as by virtue of the power conferred by the mortgage. Even in foreclosure by suit such a deed executed by the late sheriff is sufficient. *Seeley v. Manning*, 37 Wis., 578; *Herrick v. Graves*, 16 id., 157. And it is well settled at common law that the sheriff who makes a sale must execute the conveyance, though he be out of office. *People ex rel. Dunn v. Boring*, 8 Cal., 407;

Hayes vs. Frey and others.

Clerk v. Withers, 6 Mod., 290; *Wilbraham v. Snow*, 2 Saund., 47; *Allen v. Trimble*, 4 Bibb, 23; *Gibbes v. Mitchell*, 2 Bay, 120; *Lemon v. Craddock*, Litt. Sel. Cas., 252; *Tuttle v. Jackson*, 6 Wend., 224; *Jackson v. Collins*, 3 Cow., 89; *Averill v. Wilson*, 4 Barb., 180; Rorer on Judicial Sales, sec. 753. All the objections urged by the appellant go to the mere regularity of the proceedings, not to their validity. The sale under a power, even when not substantially in compliance with statute, is not strictly void, but voidable at the election of the mortgagor. If he chooses to treat it as valid, notwithstanding irregularities and defects, he may make it so. If he does not act within a reasonable time, he waives his right to object. 2. It is settled that a mortgage may be foreclosed within twenty years, though all personal remedies for the debt be barred by limitation. *Wiswell v. Baxter*, 20 Wis., 680; *Kennedy v. Knight*, 21 id., 340; *Knox v. Galligan*, id., 470; *Cleveland v. Harrison*, 15 id., 670; *Potter v. Stransky*, 48 id., 242; Jones on Mortgages, sec. 1204. 3. Even if not properly acknowledged, the mortgage was, under ch. 44, Laws of 1850, a valid lien without any acknowledgment. *Smith v. Allis*, 52 Wis., 337; *McKesson v. Stanton*, 50 id., 302. But it was properly acknowledged under sec. 2, ch. 229, Laws of 1850. This act is not restricted in operation to a release of dower, but was intended to embrace all cases where a wife joined with her husband in executing a conveyance. See R. S. 1858, ch. 86, sec. 12. 4. No certificate was necessary to show that the person before whom the deposition of Thomas C. Davis was taken was a notary public. No such certificate is required on depositions taken within this state. R. S., sec. 4106. And depositions without the state may be taken in the same manner as those within the state. R. S., sec. 4112; *Williams M. & R. Co. v. Smith*, 33 Wis., 530; *Horton v. Arnold*, 18 id., 220. Sec. 4203, R. S., does not apply to depositions, which are elsewhere provided for, but requires the certificate only upon an oath or affidavit taken without the state. *Ex-*

Hayes vs. Frey and others.

pressio unius exclusio alterius. See *Ruggles v. Bucknor*, 1 Paine, 362; *Price v. Morris*, 5 McLean, 5; *Palmer v. Fogg*, 35 Me., 372; 1 Greenl. Ev., sec. 323.

TAYLOR, J. We think there was no error in directing the trial to proceed, notwithstanding the original records and papers in the action had been sent to this court on the appeal taken from the judgment in favor of plaintiff against Lienlokken, and still remained in this court. The action had never been tried as to the defendants in whose favor the present judgment is entered, and as to them the action had not been removed from the circuit court by appeal to this court. The case had been tried only as to Lienlokken, upon an order granting him a separate trial as to the parcel of land claimed in severalty by him, and his appeal from the judgment against him to this court could not divest the circuit court of jurisdiction of the case as to the other defendants. The fact that the original pleadings were in this court, if such was the fact, when the action was called for trial, was not an insuperable objection to proceeding therein. This want of the original pleadings could easily be supplied by furnishing copies thereof for the use of the court on the trial. Whether the action should have been continued upon the motion to continue for want of witnesses, was a matter addressed to the discretion of the court, and we see no reason for holding that such discretion was not properly exercised in this case.

The learned counsel for the appellant have taken many exceptions which relate to the effect of certain conveyances made after the foreclosure sale from the purchaser at such sale to the present occupants, and to the question of the right of the defendants to claim as mortgagees in possession in case the foreclosure sale should be held void; and upon the part of the respondents the same questions are discussed, as well as the question of laches on the part of the appellant. As we have concluded that the defendants by their proofs established

Hayes vs. Frey and others.

a valid foreclosure of the mortgage, it becomes unnecessary to discuss the questions which arise upon matters occurring after the mortgage sale, and the conveyance thereunder. If the sale and deed in pursuance thereof are not void, then the title of the plaintiff is divested, and as to her and her rights it is immaterial whether the title still remains in the purchaser at the mortgage sale, or in the defendants. Her action fails with the failure of her title.

Upon the main question, the appellant's attorneys, in their printed brief and argument, object to the introduction of the mortgage as evidence because it was not properly acknowledged, as prescribed by section 12, ch. 59, R. S. 1849. There are two sufficient answers to this objection: *First*. Section 12, ch. 59, R. S. 1849, was repealed by section 2, ch. 229, Laws of 1850, and it was impliedly repealed as to all real estate conveyances made by a married woman of her separate estate by section 3, ch. 44, Laws of 1850 — "An act to provide for the protection of married women in the enjoyment of their own property."

The mortgage having been properly executed by the plaintiff, and recorded in the proper office of the register of deeds, the only remaining question of importance to the plaintiff in this action is, Was it properly foreclosed by proceedings under chapter 154, R. S. 1858, which was the law in force upon that subject when it is claimed it was foreclosed? This statute was enacted to regulate the execution of the power of sale given to the mortgagee in the mortgage, and to declare its effect when so executed. It must be admitted that no foreclosure can be had under such power by advertisement without suit, unless the proceedings are taken in substantial compliance with the requirements of that chapter. To entitle a party to foreclose under it, the following facts must be shown to exist: (1) The mortgage to be foreclosed must contain a power of sale upon default being made in any of the conditions thereof. (2) Before any steps are taken under the statute, it must appear that some default has occurred in a condition, by which the power

Hayes vs. Frey and others.

to sell becomes operative. (3) No action or proceeding must have been instituted at law to recover the debt then remaining, secured by the mortgage, or if any such action has been instituted, the same must have been discontinued, or an execution upon the judgment rendered therein must have been returned unsatisfied in whole or in part. (4) The mortgage containing the power of sale must have been duly recorded, and if it has been assigned, all the assignments thereof must have been recorded.

It is not disputed but that the mortgage foreclosed in this case contained a power of sale, nor that a default in the payment of the money secured thereby had been made before the proceedings to foreclose were commenced, nor that the mortgage itself was duly recorded in the proper office. But it is insisted by the learned counsel who argued this case orally before this court, that neither the proceedings in the foreclosure nor the proofs upon the trial show the third prerequisite, viz., that no action at law had been commenced to recover the debt. We are inclined to hold that where the proceedings are otherwise regular, they cannot be avoided for this reason, unless the fact that an action had been commenced to recover the debt secured by the mortgage is made to appear on the trial in which it is sought to avoid the effect of the foreclosure, by affirmative evidence. The party who asserts his right under the foreclosure sale is not bound to make the negative evidence. This court, in *Vincent v. Sturks*, 45 Wis., 458, in giving construction to the act which authorizes a foreign guardian to sue in this state on filing his letters of guardianship when no guardian has been appointed in this state, says: "But the condition that no guardian has been appointed in this state is a negative condition, which it would be practically impossible to prove, even presumptively or *prima facie*, if made an issuable fact by a denial of such allegation. The fact that a guardian had been appointed in this state is an affirmative allegation, and if proved would establish the inca-

Hayes vs. Frey and others.

capacity of the foreign guardian to sue in this state; and the *onus* of proving it would by all rules of pleading be upon the party making the allegation; and it would be susceptible of proof." This language is peculiarly applicable to the question in this case. The allegation on the part of the plaintiff is that the proceedings to foreclose are void because it does not appear that no action to recover the mortgaged debt had been commenced when such proceedings were instituted. The statute does not require that the notice of sale or any other proceeding in the case shall show that fact. The plaintiff might perhaps defeat the foreclosure proceedings by proving affirmatively that such an action had been commenced and was pending when the proceedings to foreclose were commenced; but to do so, we think, according to the rules of evidence, the plaintiff should produce the evidence. The case cited by the learned counsel from 4 Ind., 444, is quite different in its circumstances from the case at bar, and we do not think it applicable. If an action had been commenced against the mortgagor, he is supposed to know the fact, and can easily prove it; but if the burden be cast upon the purchaser at the mortgage sale, or his grantee, to prove that no such action had been commenced, it imposes a burden which it would be difficult to remove by proof on his part. We hold that where all the proceedings in a foreclosure by advertisement are regular, the title of the purchaser at the sale, or his grantee, will not be held void because he does not show affirmatively on his part that no action at law had been commenced to recover the mortgage debt, and remained pending when the proceedings to foreclose were instituted. If the proceedings can be avoided by reason of the fact that such an action was commenced and pending, there must be affirmative proof of such fact in the action to avoid the title of the purchaser at the mortgage sale.

The same learned counsel urged, with great force, that the proceedings to foreclose should be held void because at the time of the sale there was no evidence of record anywhere in

Hayes vs. Frey and others.

this state showing the right of the executor of the mortgagee to sell. There was neither evidence of the death of the mortgagee nor of the appointment of the person who signed the notice of sale as executor of the deceased mortgagee. In the case of *Hayes v. Lienlokken*, 48 Wis., 509, this court held that because the defendant did not prove on the trial that the person assuming to foreclose the mortgage by advertisement had any right to act in that behalf, nor that the mortgagee was dead, he did not show a defense against the plaintiff's title.

On the trial in the case at bar, the death of the mortgagee was shown to have taken place, and that the appointment of the person who signed the notice of sale as executor had been made before the foreclosure proceedings were commenced.

The objection which the learned counsel now makes to the proceedings is not that the mortgagee was not dead, or that the person signing the notice of sale was not his duly-appointed executor, but that there was no record evidence of either fact in any office in this state. This objection is based mainly upon the provision of the statute which says, "if the mortgage shall have been assigned, all the assignments thereof *shall have been recorded* before the proceedings be commenced;" and it is insisted that where an executor or administrator of the mortgagee undertakes to foreclose a mortgage given to his testator or intestate, such executor or administrator comes within the spirit if not the letter of the provision of the statute above quoted, and that his title to the note and mortgage should be of record in some court or public office within this state before the sale is made.

Leaving out of view the provision of the statute above referred to, we think the authorities are clear that an executor of the will of a mortgagee resident in another state, and to whom letters testamentary have been granted by a court of competent jurisdiction in another state, may proceed to foreclose a mortgage by advertisement in the state where the

Hayes vs. Frey and others.

mortgaged property is situated. Section 60, ch. 85, R. S. 1853, which was in force when this proceeding was had, now section 2156, R. S. 1878, reads as follows: "When a power to sell lands shall be given to the grantee in a mortgage, or other conveyance intended to secure the payment of money, the power shall be deemed a part of the security, and shall vest in and may be executed by any person who, by assignment or otherwise, shall become entitled to the money so secured to be paid." Under this section it is clear that the executor or administrator of the mortgage may execute the power; for, in case of the death of the mortgagee, dying testate but without making a special bequest of the mortgage, or in case of his death intestate, his executor in the first case, and his administrator in the second case, are entitled to the money secured by the mortgage; and we are very clear that in such case neither the executor nor the administrator would hold the note and mortgage by *assignment*, within the meaning of that word in the section above quoted.

But, in addition to the statute above quoted, the power to sell in the mortgage is granted to the mortgagee, his heirs, executors, administrators and assigns; and in the case at bar this power is granted to a mortgagee who is described in the mortgage as a resident of the state of New York at the time the mortgage was given. The language of the grant also makes a clear distinction between assigns and executors and administrators. We think the provision of the statute which requires that when the mortgage has been assigned, the assignment or assignments shall be recorded before foreclosure proceedings shall be commenced, when considered in the connection in which it is found, means an assignment in the ordinary meaning of the term, because only such assignments are authorized by any law of this state to be recorded. The word "recorded" in the statute clearly refers to a record in the office of the register of deeds where the lands are situate. The language is, "that the mortgage containing the power of sale has

Hayes vs. Frey and others.

been duly recorded, . . . and all the assignments thereof shall have been duly recorded." By looking at the statute regulating the recording of mortgages, we find that they must be recorded in the office of the register of deeds where the lands are situate, and it is quite clear that the recording of a mortgage, or of an assignment thereof, in any other county than where the lands mortgaged are situated, would not be a compliance with the statute. However convenient or useful it would be to have the authority of an executor or administrator recorded in the office of the register of deeds where the mortgage containing the power of sale is recorded, before making a sale under the power, it is quite clear that no such thing is required by the statute above cited. The record spoken of is clearly a record in the register's office, and the assignment is one which the law authorizes to be recorded in such office. The same language is used in requiring the recording of the assignments which is used in requiring the recording of the mortgage; and, as said above, it is quite clear that no record of the mortgage would satisfy the statute except a record thereof in the office of the register of deeds of the proper county. The record of the assignment must therefore be construed to be a record in the same office and no other.

We know of no law which authorizes letters testamentary or of administration to be recorded in the office of the register of deeds. The construction we give to the words "assignment" and "assignee," as used in this statute, was given to the same words in a similar statute by the supreme court of Minnesota, and we think rightly. That court held that the words did not include an executor or administrator, or the title which they derive by virtue of their appointment.

Some stress was put upon the fact that the will under which the executor acted contained a residuary clause devising and bequeathing to him and his associates all the remainder of the real and personal estate of the deceased in trust, etc., and it was argued that, therefore, he held this note and mortgage as

Hayes vs. Frey and others.

a legatee, and not simply as the representative of the deceased mortgagee, and for that reason he should be considered an assignee within the meaning of the statute. But, in looking at the will, we find several special money bequests to other parties, and no special bequest of this note and mortgage; and, as the legacies must be paid out of the personal property, the executor took the property in the first instance by virtue of his office; and, until all debts, bequests and devises were satisfied, he took nothing under the general residuary clause. As to this note and mortgage he must therefore be treated as holding the same by virtue of his appointment as executor of the estate of the deceased mortgagee.

It is further urged that a foreign executor cannot foreclose a mortgage of property in this state without probating the will in this state and taking out letters here, or filing copies of his foreign letters in the same manner as he is required to do in order to properly maintain an action in our courts. At the time this foreclosure was made, there was no statute requiring a foreign executor to do this before proceeding to foreclose a mortgage; and if it should be held that chapter 20, Laws of 1869, reënacted as section 3267, R. S. 1878, is imperative, it could not affect the proceeding now under consideration, such statute not being in force at the time these proceedings took place. This proceeding to execute the power of sale in a mortgage is not an action or proceeding in court. It is a power granted by contract, and may be executed by the persons to whom the power is granted, unless prohibited by some law of the state, or as being against public policy.

The executor of the mortgagee, although appointed in another state, is within the words of the grant, as well as within the language of section 2156, above quoted, and there is nothing in the statute regulating the sale under the power prohibiting the executor appointed in another state from executing the same. A note and mortgage is personal property both in this state and in the state of New York, and presum-

Hayes vs. Frey and others.

ably in the state of New Jersey, and upon the death of the owner, in another state, the title vests in his administrator appointed at the place of his death, or, if he die testate, in the executor appointed there. *Doolittle v. Lewis*, 7 Johns. Ch., 46-49. In the case cited it was also expressly held that an executor appointed in another state could execute the power of sale in a mortgage in the state of New York, without taking out letters in that state, and especially where the mortgage containing the power was given to a person residing out of the state of New York at the time it was executed. In that respect the case is in all respects like the case at bar, and the foreclosure was under a statute in substance like our statute. This court has frequently held that a foreign executor or administrator may sue in this state, and that the exception to his authority to maintain the action must be taken by plea or demurrer, or it will not avail the defendant. See *Smith v. Peckham*, 39 Wis., 414; *Moir v. Dodson*, 14 Wis., 279; *Sanford v. McCresdy*, 28 Wis., 103; *Ewen v. Railway Co.*, 38 Wis., 627. These cases all hold that the title of the foreign administrator or executor to the money due and personal estate of a person resident in and dying in another state depends upon his appointment in that state, and that an action commenced to foreclose a mortgage in this state, or to recover a debt due to his testator or intestate, may regularly proceed to judgment without filing any certified copies of his appointment in this state, unless objection to his proceeding in the action be taken either by demurrer or plea in abatement. If a foreign executor may foreclose a mortgage by action in this state, we see no reason why he may not execute the power of sale given to him by contract in the mortgage.

It is further suggested by the learned counsel for appellant, that the foreclosure proceedings shall be held void because it appears that the statute of limitations had run against the debt to secure the payment of which the mortgage was given. The court has repeatedly held that a mortgage could be fore-

Hayes vs. Frey and others.

closed by action although the debt was barred by the statute. See *Wiswell v. Baxter*, 20 Wis., 680; *Kennedy v. Knight*, 21 Wis., 340-347; *Know v. Galligan*, id., 470; *Edgerton v. Schneider*, 26 Wis., 385; *Potter v. Stransky*, 48 Wis., 242.

There are at least two very good reasons why the statute should not be a bar to the foreclosure by advertisement. The first is that the proceedings are not an action, and the statute of limitations has no application to the case; and the second is that the power to sell is granted whenever there is a *default in the payment* of the money secured by the mortgage. There is no pretense that the money secured by the mortgage was ever paid, and so there was clearly a default in a condition of the mortgage which authorized the execution of the power. Although the statute of limitations as construed by this court may extinguish the right of the creditor to the money agreed to be paid, as well as the right to maintain an action to recover the same, still it does not amount to a payment of the debt. We are quite clear that if a defendant in an action on contract for the payment of money answered that he had paid the amount due on the contract before suit commenced, he could not sustain his answer by showing that the statute had run in his favor before the action was commenced. So in this case it is no answer to the claim of the mortgagee that there was a default in the payment of the money secured by the mortgage, and that by reason thereof the power of sale granted in the mortgage had become operative, that the debt is barred by statute. Such bar is not a payment within the meaning of the condition in the mortgage. If a long period of time had elapsed after the money became due upon the note secured, before the proceedings to foreclose had been commenced, in the absence of any evidence showing that payment had not in fact been made, it is probable the court would presume payment, and so defeat the proceeding. But even in such case, we think, it would be competent to show by proof that no payment had in fact been made, and the proceedings would

Hayes vs. Frey and others.

be upheld. See *Pratt v. Huggins*, 29 Barb., 277; *Heyer v. Pruyn*, 7 Paige, 465.

In *Thayer v. Mann*, 19 Pick., 535, the court say, in speaking of the right of the mortgagee to proceed upon his mortgage after the debt secured is barred by the statute: "A reference to the condition contained in the mortgage shows that it is to be and remain in full force until the debt shall be paid. The creditor has a double remedy,—one upon his deed to recover the land, and the other upon the note to recover a judgment and execution for the debt; and it does not follow that he cannot recover on the one, although there may be some technical objection or difficulty to his recovery upon the other." Again they say: "The mortgage is given to secure the payment. It is to be discharged and rendered of no effect when the debt is *paid*." So, in the condition of the mortgage under consideration, the power to sell is given when default shall be made in *the payment of the debt*. And as the debt was not in fact paid, nor had such a length of time elapsed after the debt became due as to raise a presumption of payment, the power of the sale became operative. See also *Bush v. Cooper*, 26 Miss., 599. See also, as bearing upon this question, *Bank of the Metropolis v. Guttschlick*, 14 Pet. (U. S.), 19-32. It may also be remarked that the statute which regulates the sale under the power does not prescribe any limitation as to the time within which the proceedings must be had; and the general statute of limitations applies only to the times within which actions shall be commenced. The fact that the debt secured by the mortgage appears to have been barred by the statute of limitations, is no bar to the proceedings to foreclose under the statute.

We see nothing irregular in the notice of sale, the proof of publication of the same, or the affidavit of the sheriff as to the fact of the sale and the circumstances attending the same.

The fact that the certificate of sale made by the sheriff recited that a deed would not be issued until two years after the

Hayes vs. Frey and others.

sale, could not prejudice the plaintiff. No deed having been issued until after two years expired, she was benefited rather than injured thereby, as under the circumstances she would probably have been entitled in equity to redeem at any time within the two years instead of one as prescribed by the statute. That the certificate does not appear to have been sealed, is not a fatal defect.

The deed was properly made by the officer who made the sale, though out of office at the time it was made. We think that by the true construction of section 12, ch. 154, R. S. 1858, either the officer who made the sale may execute the deed after the expiration of his term of office, or his successor in office may do so. An execution of a deed by either would be a good execution. See *Prescott v. Evarts*, 4 Wis., 314-320, where a similar section as to the authority of a sheriff out of office or his successor in office to execute a deed on a sale upon execution is construed.

The copy of the will introduced in evidence by the defendant seems to have been duly certified and attested so as to authorize it to be received in evidence. The objection to the deposition of the witness Thomas C. Davis was properly overruled. The certificate shows that it was taken before an officer authorized to take the same (section 4102, R. S. 1878), and was taken and certified as provided by section 4112, R. S. 1878. There was no necessity of attaching to the certificate of the notary any certificate of a clerk or other certifying officer of the official character of such notary. See section 4106. This last section prescribes the form of the certificate which must be attached to a deposition taken under the provision of section 4112. Section 4203, referred to by the learned counsel for the appellant, has no reference to the depositions of witnesses taken out of this state. It relates simply to *ex parte* oaths and affidavits taken out of the state to be used in this state.

Whether the answer to the thirteenth interrogatory was competent testimony or not, is wholly immaterial to the determi-

EVANS vs. The St. Paul Fire & Marine Ins. Co.

nation of this case in the view we have taken of the same. It has reference to matters subsequent to the foreclosure sale, and the conveyance of the property in question under that sale. Whatever happened after the title of the plaintiff had been divested by that sale, is wholly immaterial so far as the controversy in this case is concerned. There is no evidence tending to impeach the good faith of the executor in making the sale, or in purchasing the land at such sale, and the sum bid by him is strong evidence of the good faith of the whole proceeding. We think the sale was regularly made under the statute, and that the plaintiff's title was extinguished thereby. There is no necessity, therefore, for considering the other questions presented by the briefs of the learned counsel for the respective parties.

By the Court.—The judgment of the circuit court is affirmed.

EVANS vs. THE ST. PAUL FIRE & MARINE INSURANCE
COMPANY.

February 14—March 14, 1882.

PRACTICE. *Limit of power to enlarge time for settling bill of exceptions.*

When the time limited by statute for appealing has expired, the circuit court loses all power to enlarge the time for settling the bill of exceptions in the case, and an order for such enlargement, under such circumstances, affects a substantial right, and is *appealable*. So held where the enlarging order was made by a court commissioner just *before* the time for appealing expired, and was confirmed by the court *after* the time for appealing, as limited by the statute, had expired.

APPEAL from the Circuit Court for *Clark County*.

The defendant appealed from an order, the nature of which will sufficiently appear from the opinion.

Evans vs. The St. Paul Fire & Marine Ins. Co.

The cause was submitted for the appellant on the brief of *J. W. Lusk*.

For the respondent there was a brief by *R. J. MacBride* and *James O'Neill*, and oral argument by *Mr. MacBride*.

COLB, C. J. In this case judgment for the defendant was duly rendered on the 5th of September, 1879. The costs were taxed on that day and inserted in the judgment. A written notice of the entry of such judgment was also served on the plaintiff's attorneys on the 15th of that month. No steps were taken to settle a bill of exceptions until the 3d day of September, 1881, when, on application, founded upon affidavits attempting to excuse the delay, a court commissioner granted an order that the plaintiff have thirty days from that date within which to serve and settle a bill of exceptions. On the 6th of September, 1881, the circuit court denied the motion of the defendant to set aside this order of the commissioner, and made an order confirming the same. From the last order this appeal is taken.

In limine the learned counsel for the plaintiff objects that the order of the circuit court is not appealable, for the reason that it does not affect any substantial right within the meaning of subdivision 2, sec. 3069, R. S. The case of *Wood v. Blythe*, 42 Wis., 300, is relied on in support of this position. But that case in its facts is quite unlike the one at bar; so much so as to render the decision there made inapplicable. There a judgment was rendered for the plaintiff on the 29th of July, 1876. On the 13th of December following a court commissioner, on an *ex parte* application, enlarged the time thirty days for settling the bill of exceptions. This order the circuit court set aside as being illegal and void. On appeal from the order of the circuit court, this court treated the case as though the order made by the commissioner had been made by the court itself. The head-note states the decision of the court correctly in the following language: "An order of the circuit

Evans vs. The St. Paul Fire & Marine Ins. Co.

court after judgment, granting or refusing an extension of time for the settling of a bill of exceptions and a stay of proceedings on execution, does not affect any substantial right and is not appealable." But the essential distinction between that case and the one before us is this: There the court had power, upon satisfactory excuse shown for the delay, to grant leave to settle a bill of exceptions, though sixty days from the time of serving written notice of the entry of judgment had expired (*Smith v. Smith*, 19 Wis., 522; *Kelly v. Town of Fond du Lac*, 29 Wis., 439; *Pellage v. Pellage*, 32 Wis., 136), while here the court has no such power; for two years from the time the judgment was entered and perfected had expired when the circuit court affirmed the order of the commissioner enlarging the time for settling the bill of exceptions. The right to appeal from the judgment was absolutely barred by the statute. *Sambs v. Stein*, 53 Wis., 569.

In the *Sambs Case* judgment was perfected in favor of the plaintiff, who died soon after. It was held that, as the time for the defendant to appeal from the judgment began to run in the lifetime of the plaintiff, it was absolutely barred in two years, notwithstanding the death of such plaintiff before the expiration of that period, and that during a portion of the time for appealing there was no adverse party in existence upon whom notice of appeal could be served. See also *Jarvis v. Hamilton*, 37 Wis., 87; *Leadbetter v. Laird*, 45 Wis., 522. It would certainly be an anomaly in the law if the right to enlarge the time for settling a bill of exceptions should survive the right of appeal itself. We think the statute involves no such absurdity. We therefore hold that when the time for appealing has expired, the circuit court loses all power to enlarge the time for settling the bill of exceptions in the case. The question then arises, whether an order which attempts to enlarge the time for settling the bill of exceptions, and which the court has no power whatever to make, does not affect a substantial right so as to be appealable under the statute.

West vs. Wells.

We think the question must be answered in the affirmative. Surely the adverse party may be put to much expense and trouble in attending before the circuit judge for the purpose of opposing the settlement of the bill, or he may be embarrassed in various ways if such bill is settled. It may be said that the bill of exceptions, if settled, will do the defendant no harm, for it will amount to nothing if the right of appeal is gone. So it might be said of a void judgment, that it would not injure a judgment debtor if left to stand, because he could always successfully resist any attempt to enforce it. But, confessedly, a writ of error might be brought, and an appeal is given, from a void judgment. On the whole, therefore, we are inclined to hold this order appealable, though the court had no power to settle a bill of exceptions when it affirmed the order of the commissioner. It seems to us the order differs essentially from an order staying proceedings in a cause, or one granting a continuance, and orders of that character, which are matters resting largely in the discretion of the court granting them, and are not appealable. *Felt v. Amidon*, 48 Wis., 66.

The conclusion which we have reached is, that the order of the circuit court appealed from must be reversed, and the cause be remanded with directions to vacate the order of the commissioner above referred to.

By the Court.—So ordered.

WEST VS. WELLS.

February 14—March 14, 1882.

SALE OF CHATTEL: *Liability of purchaser's agent: Misleading instruction.*

In an action for the purchase price of hay delivered by plaintiff to one M., plaintiff's evidence tended to show that the hay was purchased by defendant, and that the latter did not disclose the fact that he was acting

West vs. Wells.

as agent for another; and defendant's evidence tended to show that he acted merely as bearer of messages to plaintiff from M. or S. or one of them, concerning the purchase, and that his relation to the transaction was fully disclosed to plaintiff. *Held*, that it was error to instruct the jury that "if defendant gave plaintiff a right to understand that he (defendant) was *making himself responsible* for the hay, and that plaintiff might look to him for the pay," then he was liable; the only question under the evidence being whether defendant purchased the hay, without disclosing his principal.

APPEAL from the Circuit Court for *Clark* County.

Action to recover the price of eight tons of hay alleged to have been sold and delivered by the plaintiff to the defendant. The answer is a general denial. The case is stated in the opinion. Defendant appealed from a judgment against him for the amount of the plaintiff's demand.

R. J. MacBride, for the appellant.

James O'Neill, for the respondent.

LYON, J. The testimony on the part of the plaintiff tends to show that the hay, to recover the price of which this action was brought, was purchased by the defendant; and that the defendant did not disclose that he was making the purchase for and on the responsibility of another, for whom he was acting as agent. The hay was delivered to one Meeks, who was getting out logs for Mr. Spaulding. The testimony of the defendant tends to show that, although he had some part in purchasing the hay, he was acting for either Meeks or Spaulding, or both, merely as the bearer of messages from them, or one of them, concerning the purchase, and that his relation to the transaction was fully disclosed to the plaintiff, who sold the hay to Meeks or Spaulding, and not to him.

The learned circuit judge instructed the jury as follows: "The plaintiff's counsel claims that *Mr. Wells* may have so managed the negotiation as to have given the plaintiff the right to understand that he would pay for it, or that the plaintiff might look to the defendant for the pay. It is upon the prin-

West vs. Wells.

ciple that, if he did not in fact buy the hay, he has misled the plaintiff to his damage. You will consider that question in connection with the other question: Did the defendant buy the hay? Or did he so conduct the negotiation as to give the plaintiff a right to understand that he was making himself responsible for it, and that he might look to him for the pay? If he did either of these things — either bought it or gave the plaintiff the right to understand that he was responsible for the hay, and that he might look to him for the pay,—then he should be held responsible for it. But if he did not buy the hay, and if he notified the plaintiff that he was not buying the hay, and that the pay was to come from another source, then he should not be responsible for the hay.”

Assuming that the defendant made the contract with plaintiff for the purchase of the hay and its delivery to Meeks, the controlling question of fact in the case is, Did the defendant disclose for whom he was acting, and make the purchase on the responsibility of his principal? If he did so, he is not liable, because it is not claimed that he specially bound himself as surety for his principal. If he did not disclose his principal, he is liable. Failing to do so, he made himself the principal, and became the absolute purchaser of the hay, and is liable to pay for it. Hence, the question for the jury to determine was, whether the defendant purchased the hay, and that question was clearly and properly submitted to them by the judge. Had he stopped there, the charge would be faultless. But he went further, and submitted to them the question whether the defendant so conducted the negotiation as to mislead the plaintiff to believe that he was making himself personally responsible for the price of the hay.

The jury might well have understood from this instruction that, although they should find the defendant disclosed to the plaintiff that he was acting for Meeks or Spaulding in making the purchase, and did not, in fact, agree to pay for the hay, they were at liberty to find that he misled the plaintiff to

 Stilling vs. The Town of Thorp.

believe that he was making himself personally responsible therefor.

We find no evidence in the case which upholds the instruction — none tending to prove that the plaintiff was misled in that behalf. The instruction was therefore erroneous. The verdict of the jury for the plaintiff may have been controlled by their finding upon the question of fact thus erroneously submitted to them. Because this is so, the error is material and fatal to the judgment.

By the Court.— Judgment reversed, and cause remanded for a new trial.

STILLING VS. THE TOWN OF THORP.

February 14 — March 14, 1882.

COUNTIES: HIGHWAYS. (1) *When county liable for condition of highway.*

EVIDENCE. (2) *Reading medical books to jury.*

INSTRUCTIONS TO JURY: (3) *Must be considered with reference to facts in evidence.*

REVERSAL OF JUDGMENT: (4) *For admission of improper evidence.*

1. Under our statute (sec. 1339, R. S.), a town is relieved from liability, and the county is liable, for damage caused by the defective condition of a highway, only where such highway has been "adopted" as part of a county highway, under sec. 1308, R. S., and not in cases where a road has been merely "laid out" by the county board, under secs. 1300-1307.
2. Portions of medical books cannot be read to the jury as evidence, although such books have been shown by expert testimony to be "standard works in the medical profession."
3. The question whether there was error in giving or refusing certain instructions, must be determined by a consideration of the facts in evidence to which they related, and not merely of their accuracy as abstract propositions of law. And where the bridge whose defective condition is alleged to have caused an injury complained of, was only twelve feet wide, and sloped southward so as to be four inches lower on the south than on the north side, and the ice was much thicker and rougher on the northern than on the southern side, there was no error in refusing to charge that "the mere slippery condition of the bridge, arising from the

Stilling vs. The Town of Thorp.

ordinary action of the elements (as ice and snow) is not such a defect as would render the town liable," or in charging that, if the ice rendered the highway insufficient, the town was bound to restore it to a reasonably safe condition within a reasonable time.

4. A judgment will not be reversed for the improper admission of evidence, which, in view of the other evidence in the case, could not have affected the verdict.

APPEAL from the Circuit Court for *Clark* County.

Action for injuries to the plaintiff's person, and to his team, wagon, etc., which injuries are alleged to have occurred on the 17th of January, 1880, from the insufficiency or want of repair of a certain bridge in the defendant town, on the road between Chippewa Falls and Colby, alleged to have been laid out, established and opened in pursuance of ch. 159, Laws of 1879. Plaintiff had a verdict for \$2,500; and from a judgment thereon the defendant town appealed.

R. J. MacBride and *James O'Neill*, for the appellant:

1. The court erred in excluding the testimony offered to prove that the highway in question was a county highway. The board of supervisors could proceed to adopt a road as a county road under secs. 1300-1309, R. S. The petition asked that the board establish a county road, and the record states that the petition was granted. The petitioners did not ask that a new road be laid out, for the petition states that it is "the only road all passable through the county," etc. They evidently intended to proceed under sec. 1308, R. S., and to ask the board to adopt this "main traveled highway." The word "establish," in this connection, is synonymous with the word "adopt." And it was not necessary that a formal order should have been drawn up and adopted by the board. The record by the clerk in the proceedings at a regular meeting is sufficient. If the board adopted or established the highway as a county road, the county and not the town is liable for its insufficiency. R. S., sec. 1339; *Jensen v. Supervisors*, 47 Wis., 303. And see *Hark v. Gladwell*, 49 Wis., 172.
2. The court erred in not permitting counsel to read from medical books

Stilling vs. The Town of Thorp.

proved to be standard works. *Luning v. State*, 2 Pin., 215; *City of Ripon v. Bittel*, 30 Wis., 614; *State v. Hoyt*, 46 Conn., 330. 3. The court erred in those portions of the charge relating to the icy condition of the road. The mere fact that a highway is slippery from ice upon it, if there is nothing in the construction or shape of the way which occasioned any special liability to formation or accumulation of ice, is not a defect within the meaning of the statute. *Stanton v. Springfield*, 12 Allen, 566; *Stone v. Hubbardston*, 100 Mass., 49; *Hutchins v. Boston*, 12 Allen, 571; *Cook v. Milwaukee*, 24 Wis., 270; *Perkins v. Fond du Lac*, 34 id., 435; *Quincy v. Barker*, 81 Ill., 300; 2 Thompson on Neg., 784; *Smyth v. Bangor*, 72 Me., 249. 4. The evidence that plaintiff had a family entirely dependent on him for support was inadmissible. It could have been offered for no other purpose than to enhance the damages. *Moody v. Osgood*, 50 Barb., 628; *Barbour Co. v. Horn*, 48 Ala., 566; *Pitts., Ft. W. & C. Railway Co. v. Powers*, 74 Ill., 341; *Chicago v. O'Brennan*, 65 id., 160; *Macon & W. Railroad Co. v. Winn*, 26 Ga., 259; *Chicago & N. W. Railway Co. v. Bayfield*, 37 Mich., 205; 21 Wis., 372; 38 id., 613. 5. The statements made after the accident by the chairman of the town should have been excluded. The defendant is not bound by his admissions not made while in the performance of any official duty. *Cortland Co. v. Herkimer Co.*, 44 N. Y., 22; *Glidden v. Unity*, 33 N. H., 571; *Town of Wheelock v. Town of Hardwick*, 48 Vt., 19; *Trustees of Baptist Church v. Ins. Co.*, 28 N. Y., 153; *Hazleton v. Union Bank*, 32 Wis., 48; *Mil. & Miss. R. R. Co. v. Finney*, 10 id., 388; 72 Me., 249.

For the respondent there was a brief by *H. H. Hayden* and *W. P. Bartlett*, and oral argument by *Mr. Hayden*.

CASSODAY, J. It is urged that the bridge or road, at the time and place of the injury, was a county highway, adopted as such, and that the county of Clark, and not the defendant, was bound to keep it in repair.

Stilling vs. The Town of Thorp.

The defendant offered in evidence a petition purporting to be signed by forty-seven freeholders and residents of the towns of Thorp and Hixon, in Clark county, to the board of supervisors of that county, "*to establish a county road*" on a line designated, commencing at a point at the west line of Clark county and running east and including the line of road in question, which is described as "the only road that is all passable through this (Clark) county; the streams are all bridged on said route, and chopped through, with the exception of three miles in town 28, range 3. We petition said board *to lay out said road* for the benefit of the inhabitants of said towns. As herein mentioned, it is, from beginning to ending, sixteen miles of road." They also offered in evidence an amendment to the petition, which related to the three miles mentioned in the petition as not being chopped through (and which were a little east of the place of the injury), and provided for going a mile south, and then east, instead of going directly east, as mentioned in the petition. In connection with this offer they also offered in evidence the minutes of the meeting and proceedings of the county board of supervisors of Clark county, held November 16, 1878, showing that upon motion the petition with the amendment was granted. These offers were excluded.

The defendant also offered to show by such records that November 15, 1879, the board levied a county road tax, and directed \$300 to be expended in the town of Thorp, and that November 13, 1880, the board levied a county road tax, and directed \$600 to be expended in the town of Thorp, and that commissioners were appointed to apply such appropriations; which offers were rejected. Did these offers tend to exonerate the town from liability, and fix the same upon the county? Undoubtedly the county boards of supervisors have authority "to lay out highways" in the manner and under the circumstances stated in sections 1300-7, R. S. So the county board may "adopt any main traveled highways, or parts of such

Stilling vs. The Town of Thorp.

highways, as county roads, and shall thereafter cause the same to be kept in good repair so long as they remain under their control." Section 1308, R. S. So the county may "designate any such highways, or parts of such highways, for the purpose of expending money in their repair, without adopting them as county roads, or assuming any responsibility for any injury caused by any insufficiency or want of repair therein, unless caused by the neglect of their officers." Section 1308, R. S.

It has often been held that no action lies at common law against a town for damages sustained through the defect of the highways in such town. *Mower v. Leicester*, 9 Mass., 247; *Sawyer v. Northfield*, 7 Cush., 494; *Holman v. Townsend*, 13 Met., 297; *Barry v. Lowell*, 8 Allen, 127; *Oliver v. Worcester*, 102 Mass., 499; *Town of Waltham v. Kemper*, 55 Ill., 346; *Bussell v. Steuben*, 57 Ill., 35; *Eastman v. Meredith*, 36 N. H., 284. On the same theory, it has often been held that a county is not liable at common law for a defect in a public highway of the county. *Huffman v. San Joaquin Co.*, 21 Cal., 246; *Sherbourne v. Yuba Co.*, 21 Cal., 113; *Crowell v. Sonoma Co.*, 25 Cal., 318; *Freeholders of Sussex Co. v. Strader*, 18 N. J. L., 108; *Cooley v. The C. F. of Essex*, 27 N. J. L., 415; *Commissioners v. Mighels*, 7 Ohio St., 109; *Scales v. O. of Chattahoochee Co.*, 41 Ga., 225; *Brabham v. Supervisors*, 54 Miss., 363; *Woods v. Colfax*, 15 West. Jur., 165, and note.

The statute requires that highways laid out by county boards shall be opened and repaired in the respective towns in the same manner as other highways. Section 1307, R. S. The statute also requires that all state roads shall be opened and worked as other highways by the several towns in which the same are or may be located. Section 1316, R. S.; *Jensen v. Supr's Polk Co.*, 47 Wis., 298. The statute making any town, city or village liable for any damage happening by reason of the insufficiency or want of repairs of any bridge, etc., in such town, city or village, does not limit such liability to town roads, nor to any particular class of roads, except that it pro-

Stilling vs. The Town of Thorp.

vides that if such defect is in a "bridge, sluice-way or road which any county shall have *adopted* as a county road, and is by law bound to keep in repair, such county shall be liable therefor, and the claim for damages shall be against the county." Section 1839, R. S. This exception is in strict harmony with the provision of section 1308, R. S., above referred to, which requires the county board to keep in good repair such "*main traveled* highways or parts of *such* highways" as they "may adopt" as county roads, so long as they remain under their control. From these statutory provisions it is very evident that counties are not liable for damages by reason of the insufficiency of any bridge, sluice-way or road, except in the single case of a main traveled highway, or parts of such highway, which the county board "have *adopted* as a county road."

The simple question therefore is, whether the rejected evidence shows that the highway in question had been "adopted" by the county board as a county road. Such adoption, under the statute, seems not only to be confined to "traveled highways or parts of such highways," but to "main" traveled highways. It would seem to have no reference to such roads as are laid out and established by the county board in the first instance. It would seem that the rejected evidence did not tend to show that the county board had adopted the road in question as a county road, much less that it was a "main traveled highway." On the contrary, the petition, by its terms, giving it the most liberal construction, is nothing but an "application" to "lay out" and to "establish" a county road. *Hark v. Gladwell*, 49 Wis., 172. Whether it was ever in fact laid out and established as a county road, or as a state road, does not appear, nor was it material, since in neither event would the town be relieved of its statutory liability. So far from the road being a "main traveled road," subject to adoption by the county, the defendant gave evidence tending to show that "this road was merely a trail cut through the

Stilling vs. The Town of Thorp.

woods so that wagons could get through, and it had got cut up so bad that there were trees across it; that they had to go around through the woods, where teamsters had cut their own road at the time of the accident. It was about three miles west of the bridge before you reached the turnpike, and about 10½ miles east before you reached the turnpike. For the three miles west of the bridge it was cut out merely wide enough for a wagon to go through." For the reasons given, there was no error in refusing to instruct the jury that the town was not liable by reason of the adoption of the road by the county.

The defendant examined a medical witness, and, after proving by him that certain medical books shown him were standard works in his profession, offered to read extracts from them to the jury as evidence; but the offer was rejected, and the ruling is assigned as error.

In *Luning v. State*, 2 Pin., 215, it was held to be discretionary with the trial judge whether or not counsel shall be allowed in his *argument* to read to the jury medical or scientific works. See *Wade v. De Witt*, 20 Tex., 400; *Leyg v. Drake*, 1 Ohio St., 286.

In *Ripon v. Bittel*, 30 Wis., 619, the court felt bound, under the peculiar condition of the record, to assume, in order to sustain the judgment, that the medical books had been admitted for the purpose of impeaching the evidence of a medical expert, who had given certain testimony as to their contents. To the same effect is *Conn. Mut. Life Ins. Co. v. Ellis*, 89 Ill., 516. The inference from the opinion is, that they would not have been admissible as evidence for any other purpose. The precise question here presented is, whether a party can give in evidence extracts from standard medical works referred to by his own expert witness, for the purpose of corroborating such expert, and of increasing the weight to be given to his testimony.

In *State v. Hoyt*, 46 Conn., 337, the trial court refused to allow such extracts to be read by counsel as a part of his argu-

Stilling vs. The Town of Thorp.

ment, and, upon error being assigned, the cause was for that reason reversed by three of the five judges of the supreme court of that state. The opinion of the court, however, cites but one case in support of the decision, and that from the same state. Two of the judges dissented, and, in support of their opinion, cited English, Massachusetts, Indiana, Texas and Wisconsin cases.

In *Ashworth v. Kittridge*, 12 Cush., 193, it was held that "medical books, even of received authority, are not competent evidence, if objected to by the adverse party." The reason given, in the terse opinion of Chief Justice SHAW, is that the written statements contained in such extracts are "wanting the sanction of an oath," and are "made by one not present, and not liable to cross examination." See *Com. v. Wilson*, 1 Gray, 338.

In *Com. v. Sturtivant*, 117 Mass., 123, it was held that "books on medical jurisprudence cannot be read by a witness to the jury, although the witness is an expert, and concurs in the views therein expressed." The only difference between that case and this is, that here the counsel proposed to read the extracts, instead of the witness. These cases are in harmony with our own judgment, as well as with the former decisions of this court on the subject. See discussions in 24 Alb. Law J., 266, 284; Wharton on Ev., §§ 665-6; 1 Greenl., § 440, and note.

Among other things the court charged the jury: "It is also alleged that the bridge was insufficient by reason of the fact that ice had accumulated upon it, which rendered it unsafe and dangerous. The fact alone that there may have been ice upon the bridge, which made it unsafe and dangerous, is not negligence. If the highway and bridge, at and near that point, was properly constructed and reasonably sufficient and safe before the ice came upon it, the town is not liable, unless it is negligent in restoring the highway to a reasonably sufficient and safe condition; [but it is incumbent upon the town to restore

Stilling vs. The Town of Thorp.

it to a reasonably sufficient and safe condition within a reasonable time], as soon as it can reasonably be done; so that, if the road was reasonably sufficient and safe before the ice came upon it, and the officers had not had a reasonable time to learn of the condition of the road and restore it, then the defendant would not be liable for plaintiff's injuries by reason of ice. [But, on the other hand, if the ice rendered the highway insufficient, and a reasonable time had elapsed in which the condition of the road should become known to the defendant's officers, and in which they might have repaired it, and that defect caused the plaintiff's injuries, then the defendant is liable."] The portions in brackets were excepted to.

The court was then asked to give the following instruction, which was refused: "The mere slippery condition of the highway and bridge arising from the ordinary action of the elements (as ice and snow) is not such a defect as would render the town liable; and if the jury should find in the case, under all the evidence, that the injuries of the plaintiff were occasioned solely by the highway and bridge being in such slippery condition, then the jury must find for the defendant in this case, even though they should also find that the plaintiff was in the exercise of ordinary care and prudence."

In passing upon the alleged errors in this portion of the charge, and in the refusal of this instruction, we are to remember that the bridge, off from which the plaintiff's wagon slid and turned over, was eighteen to twenty feet long, and only twelve feet wide, and that the surface of the bridge sloped to the south, so that the surface of its southern side was from four to twelve inches lower than the surface at the northern side. The bridge was about two feet out of line with the road at each end, and the ice on the surface of the bridge was much thicker and rougher on the northern side than on the southern side.

In charging the jury, the court was bound to keep in view these admitted facts and the evidence in the case. The jury

Stilling vs. The Town of Thorp.

were not to be instructed upon law in the abstract, but only as to the law applicable to the admitted facts and the evidence of the respective parties. The court was not, therefore, bound to submit to the jury the effect of mere slipperiness from the ordinary action of the elements — as ice and snow — in a bridge properly constructed and having a level surface; but only to give such instructions as should be requested, as to the law applicable to that bridge in its then present condition, as revealed by the evidence of the respective parties. The undisputed evidence, therefore, clearly shows that there could be no such thing as “mere” slipperiness from the “ordinary” action of the elements, but necessarily must be *such* slipperiness as would be created by the elements (as ice, snow, heat and cold) upon a bridge with a sloping surface, as that had, and constructed as that was. So, when the court told the jury that “if the ice rendered the highway insufficient, and a reasonable time had elapsed in which the condition of the road should become known to the defendant’s officers,” etc., it evidently refers to that bridge in its then present condition, and so sloping that if ice was formed on its surface at all, especially if considerably the thickest upon the upper side, it would of necessity be dangerous to a traveler with a wagon. *Prideaux v. Mineral Point*, 43 Wis., 513, No. 3. In this respect *Smyth v. Bangor*, 72 Me., 249, and other cases, are clearly distinguishable. We conclude that the rulings of the court in this regard were not erroneous.

The plaintiff was allowed, without objection, to give this testimony: “At the time of the accident I had a wife and two children; one is three years old, and the other is one year old. I have no other business besides carpentering and labor. I have no trade of any kind. Q. Was your family entirely dependent on you for support? A. Yes, sir.” After this evidence was given, the defendant objected, and the judge remarked that he thought the objection came pretty late, but that he did not think the “question” relevant. The defend-

Stilling vs. The Town of Thorp.

ant then moved "to strike out the *answer*," which motion was overruled, and the defendant excepted; and this exception is assigned as error. The motion to strike out the "answer" clearly relates to the answer, "Yes, sir," and nothing more. In view of the testimony already given, and to which no objection or motion to strike out was made, the answer, "Yes, sir," became entirely immaterial. The objectionable testimony, if any, was that which preceded it, in relation to his wife and children, and their age; and as to this there was no motion to strike out.

Error is assigned because a witness was permitted to state what the chairman of the town said after the injury, indicating that he had knowledge of the condition of the bridge before the injury. But the chairman of the town had himself testified that he had "passed over the bridge the Sunday before the accident." The fact of notice having thus been admitted, the testimony complained of was entirely immaterial, and could not have affected the verdict, even if its admission had been error. For such immaterial error a judgment will not be reversed. *Hazleton v. Union Bank*, 32 Wis., 36; *Davis v. Town of Fulton*, 52 Wis., 657.

We cannot say that the damages are excessive, and counsel really do not ask a reversal on that ground. Nor can we say, as a matter of law, that the plaintiff was guilty of contributory negligence. The case is, in some respects, similar to *Kenworthy v. Ironton*, 41 Wis., 647, in which the verdict for the plaintiff was sustained. The instruction requested by the defendant, which we have not referred to, was, in our opinion, sufficiently covered by the general charge.

By the Court.—The judgment of the circuit court is affirmed.

Tucker vs. Cole and another.

TUCKER vs. COLE and another.

*February 15 — March 14, 1882.*PARTNERSHIP. (1) *When notice to one partner binds all.*REVERSAL OF JUDGMENT: (2) *For improper remarks of attorney.*

1. Where timber is purchased by a firm, prior notice to one member of the firm that it was cut from land not belonging to the proposed vendor, is notice to all the partners, so as to subject them all to the rule of damages prescribed in such cases by sec. 4269, R. S.
2. A judgment will not be reversed for improper remarks made by the respondent's attorney to the jury, where there is no reason to believe that the verdict was influenced by them to the appellant's injury.

APPEAL from the Circuit Court for *Clark County*.

The defendants appealed from a judgment in favor of the plaintiff. The case is stated in the opinion.

James O'Neill, for the appellants.

For the respondent there was a brief by *R. J. MacBride* and *J. R. Sturdevant*, and oral argument by *Mr. MacBride*.

TAYLOR, J. The plaintiff recovered judgment for the value of a quantity of staves, which he alleges were made from timber cut upon his land without his authority, by an act of trespass, and which afterwards came into the possession of the defendants and were converted by them to their own use. The plaintiff recovered the value of the staves while in the hands of the defendants, under the provisions of section 4269, R. S. 1878. The proofs clearly show that a quantity of staves, made out of timber unlawfully cut upon the plaintiff's land, were purchased by the defendants and afterwards sold by them. It seems to be admitted by the defendants that the plaintiff is entitled to a judgment for the value of the standing timber, and the sole controversy is as to the right of the plaintiff to recover the value of the staves while in the hands of the defendants. The plaintiff claimed the right to such recovery on the ground that the defendants had notice that they were made

Tucker vs. Cole and another.

out of his timber, unlawfully and wrongfully cut upon his land by the person from whom they purchased them, and so they were within the terms of the section above referred to; that they were in fact purchasers with notice of the trespass.

The evidence on the part of the plaintiff not only tended to show that the defendant *Paschelles* had notice of the trespass, but that he actually directed the party who did the cutting to go on and commit the trespass. It is true, this is denied by *Paschelles* in his testimony; but as the jury have found in favor of the truth of the evidence given by the plaintiff's witnesses, their verdict is conclusive upon that point. There was no evidence that the defendant *Cole* had any notice of the trespass; but the evidence shows that *Cole* and *Paschelles* were partners in the business of purchasing and selling staves, and other timber and commodities, at the place where these staves were bought; and that the staves were bought and paid for by the firm, and were afterward sold by the firm, and the firm received the money therefor. The learned counsel for the appellants insist that the defendant *Cole*, although a partner of *Paschelles*, and although the staves were bought and sold by the firm, was not chargeable with notice of the trespass by reason of notice to his partner, and therefore it was error to assess damages against him under the statute above referred to. In this we think the learned counsel is mistaken.

The general rule is, that notice to one partner is notice to all, and that the tort of one partner, committed in the transaction of the ordinary business of the firm, is the tort of all. Story, in his work on Partnership, section 107, says: "So, notice to or by one of the firm is deemed notice to or by all of them;" and in section 108 he says: "The principle extends further, so as to bind the firm for the frauds committed by one partner in the course of the transactions and business of the partnership, even where the other partners had not the slightest connection with or knowledge of or participation in the fraud; for, as has been justly observed, by forming the connection of

Tucker vs. Cole and another.

partnership the parties declare themselves to the world satisfied with the good faith and integrity of each other, and impliedly undertake to be responsible for what they shall respectively do within the scope of the partnership concerns." Again, in section 166 of the same work, the learned author says: "But torts may arise in the course of the business of the partnership, for which all the partners will be liable, although the act may not in fact have been assented to by all the partners;" and then adds various instances where partners are held responsible for the frauds and conversions of their associates, though committed without their knowledge.

If, in the case at bar, the proof had been that before the defendants purchased these staves one of the partners had been expressly notified by the owner of the timber that they had been made out of his timber, unlawfully cut upon his land, and if they bought them he should hold them responsible for their value, can there be any doubt that if the firm afterwards bought them and converted them to their own use by a sale and receipt of the proceeds, they would be liable in an action of trover for their value, under the statute, as purchasers with notice? In that case they would not only come within the spirit of the act, but within its express letter. This statute has been considered by this court, and we have limited its effect to purchasers with notice of the wrong, and have held that it did not apply to purchasers in good faith, without notice or knowledge; and we have also said that the burden of proof is on the plaintiff to show notice to the defendant who is a purchaser from the wrong-doer, otherwise he will be presumed to be a purchaser in good faith, and not within its provisions. See *Wright v. Bolles Wooden Ware Co.*, 50 Wis., 167; *Tuttle v. Wilson*, 52 Wis., 643.

In this case the plaintiff took the burden of proof, and gave evidence on his part which, if not contradicted, was quite sufficient to show notice and bad faith on the part of one of the partners; and, as we have seen, such notice and bad faith must

Tucker vs. Cole and another.

under the law be imputed to his copartner. He cannot reap the benefits of the transaction, and yet excuse himself from liability on the ground that he had no notice. If there was any fraud or bad faith, it was the fraud and bad faith of the partnership, as well as of the individual partner. The statute referred to is not in its nature a criminal or penal statute. It simply prescribes a rule of assessing damages in certain cases. The authorities cited by the learned counsel for the appellants, showing that one partner cannot be held liable criminally or in a penal action for the acts of his partner, have no application to a case under this statute. If the principal is not liable for the acts or knowledge of his agent, or the partner for the acts or knowledge of his copartner, under this act, it would very soon become a very feeble instrument in effecting the purpose for which it was enacted.

The learned counsel for the appellant insists that the judgment should be set aside because the damages are excessive. We are not clear that the verdict is not well sustained by the evidence as to its amount. The defendants set out in their answer that they tendered before suit brought \$60 for the plaintiff's damages, and the verdict is for but \$75. We cannot weigh the testimony in a nice balance for the purpose of determining whether the verdict is for a few cents or a few dollars more than the balance of the testimony would indicate was the exact amount of damage done. The weighing and balancing of testimony is for the jury; and if there is testimony which will justify the correctness of the amount found by them, such amount must stand as the true amount. We think the evidence given is sufficient to sustain the verdict as to amount.

The counsel also insist that the judgment ought to be reversed for the misconduct of the plaintiff's attorney in his remarks to the jury. A part of the remarks which are claimed to be objectionable were perhaps improper; but as the counsel immediately stated to the jury that such statements were out-

Tucker vs. Cole and another.

side of the case and should not be considered by them, and as we do not think there is anything in the verdict of the jury which indicates that the defendants were in any way prejudiced by them, they should not effect a reversal of the judgment.

The learned counsel also alleges that there was error in the instructions given to the jury. The first exceptions are to the following instructions: "That the plaintiff could recover of both defendants the value of the staves, although one of them only was a trespasser;" and, "So, if you find that the defendant *Paschelles* directed the cutting of this timber, then you should give the plaintiff damages according to the value of the timber as it was in staves at Neillsville at the time when the defendants disposed of them and sold them." These questions we have already disposed of in this opinion, and they need no further comment. They were clearly right under the authorities above cited. We see no objection to the comment of the learned judge that "it is evident that the mere value of the stumpage in a great many cases does not compensate. Many men who have choice timber would be reluctant to have it cut for the price of the stumpage. So the law has fixed another rate of damages where the trespass is willful. That rule of damages would make the defendants liable for the value of the staves at the time when they took them and disposed of them." This is no more than a proper comment on the propriety of the law fixing the rule of damages for the wrongful cutting of timber, and, taken in connection with the rest of the charge, could not have misled the jury into the belief that they could give such damages against the defendants although the evidence in the case did not bring the defendants within the provisions of the statute. The instruction asked and refused was properly refused, under the rule of the liability of one partner for the acts of another, as above stated.

By the Court.—The judgment of the circuit court is affirmed.

Bullard vs. Kuhl.

BULLARD VS. KUHLE

February 15 — March 14, 1882.

APPEAL FROM JUSTICE'S COURT. *Case cannot be tried de novo by stipulation.*

On appeal from justice's court in a case where, by the statute (sec. 3767, R. S.), the cause is required to be "heard on the original papers and the return of the justice containing all the material evidence," etc., the court cannot take authority, from a *stipulation* of the parties, to try the cause *de novo* as if originally brought in that court; and a judgment rendered upon such a trial is held, upon appeal, *void* for want of jurisdiction.

APPEAL from the Circuit Court for *Clark* County.

The defendant appealed from a judgment in favor of the plaintiff. The case is stated in the opinion.

For the appellant there was a brief by *J. R. Sturdevant*, his attorney, with *R. J. MacBride*, of counsel, and oral argument by *Mr. MacBride*.

James O'Neill, for the respondent.

ORTON, J. This action was originally brought before a justice of the peace on a promissory note for \$12, and the defendant answered that the note was obtained by fraudulent representations and undue influence. The cause was regularly tried by the justice, and judgment rendered for the defendant, and the plaintiff appealed to the circuit court, and a return was made. While the cause was pending in the circuit court, the parties, by their respective counsel, stipulated "that there may be a new trial in this action, the same as though this action had been originally brought in this court." Thereupon there was a trial *de novo* by the court, a jury having been waived; and the court made findings of fact, and rendered judgment in favor of the plaintiff for \$12.83 damages, and \$52.28 costs, which costs embraced the costs in the justice's court, of \$15.44. The record shows that the circuit court ob-

Bullard vs. Kuhl.

tained jurisdiction of this action only by the appeal and the return of the justice; and the appeal is still pending, and has not been disposed of, either by a hearing according to the statute, or by dismissal, and the judgment in the action for the defendant in the justice's court still remains unreversed, and a new trial in all respects, upon new evidence and upon the pleadings filed before the justice, and the issue there made, was had in the appellate court, and judgment was rendered in that court upon the *merits*, in which is included the costs made before the justice. The stipulation is for a *new trial* in the action pending on appeal.

There is not the slightest pretext or reason for calling this the trial of an original action in the circuit court, by stipulation of the parties. The circuit court did not obtain jurisdiction of the action by stipulation, but that court proceeded to try it according to the stipulation, and not according to the statute. This was clearly a mistrial or no trial of the action on the appeal. "A trial is the examination of a cause before a judge who has jurisdiction of it according to the laws of the land." Jacob's Law Dict., tit. "Trial."

That the circuit court had no jurisdiction to try this action and render judgment as it did, is made certain by several decisions of this court, as well as by the decisions of other courts, I think without an exception. When by the statute of this state appeals from justice's courts could only be taken to the county courts, and not to the circuit courts, an appeal pending in the county court was removed by the stipulation of the parties to the circuit court, and there tried. This court held in *Dykeman v. Budd*, 3 Wis., 640, in such a case, that "the order of the county court changing the venue in this case shows on its face that it was made by consent and not in conformity with the statute," and that the circuit court had no jurisdiction to try the cause. It was not even pretended that the circuit court had jurisdiction by consent to

Bullard vs. Kuhl.

try the action because it had original jurisdiction over such subject matters.

In *Verbeck v. Verbeck*, 6 Wis., 159, the case was improperly certified to the circuit court on the ground that the title to lands would come in question, and in the circuit court the plaintiff proceeded and offered his evidence, and rested his case, without any objection from the defendant, and then the defendant objected to any further proceedings on the ground of a want of jurisdiction. It was insisted by the plaintiff that the trial had so far proceeded by consent, which gave the court jurisdiction. Chief Justice WHITON, in delivering the opinion of the court, said: "The circuit court did not obtain jurisdiction by the action of the parties and the justice;" and then disposed of the reason urged here in favor of the jurisdiction of the circuit court to try the action as an original one: "But it is claimed by the defendant in error that, as the circuit court had jurisdiction of the subject matter of the suit, and as the appearance of the parties before that court gave it control of them, the court was correct in retaining the case, and deciding it *on its merits*. This argument would be entitled to great weight did it not involve *a palpable evasion of the statute*. That has prescribed the manner in which cases which are commenced before justices of the peace shall be taken to the higher courts, and we cannot sanction a practice which does not comply with it." To the same effect are *Miles v. Chamberlain*, 17 Wis., 446; *Cecil v. Barber*, 3 Wis., 297; *Watry v. Hiltgen*, 16 Wis., 516; *Chinnock v. Stevens*, 23 Wis., 396.

In *Latham v. Edgerton*, 9 Cow., 227, a prerequisite to an appeal from the judgment of a justice to the common pleas had not been complied with, and yet the return was made and the parties appeared and proceeded with the trial, and it was tried without objection, and judgment rendered for the plaintiff. It was held "that, although the parties to such

Bullard vs. Kuhl.

appeal join issue and go to trial in the court of common pleas, yet the court does not by that means acquire jurisdiction;" and the court said further in the opinion: "The parties are considered as having a standing in court only by force of the appeal; and although the subject matter of the suit be one over which the court might have had original jurisdiction, yet, having been brought there by appeal, the subsequent acts of the parties are considered as compulsory, and not as intended to confer jurisdiction upon the court." This language is strictly applicable to this case.

In *Watts v. Tittabawassee Boom Co.*, 11 N. W. Rep. (Mich), 377, a stipulation was made that only one certain question was to be submitted to the jury under special instruction of the court, and that "the parties should have the same right of review by writ of error or otherwise as if the case were submitted in the usual manner, leaving it simply a question of law;" and on writ of error to the supreme court on the judgment rendered on such stipulation, it was held that the jurisdiction of the court could not be abridged by stipulation, and that "the practice the parties have seen proper to adopt has resulted in a mistrial, and the case must go back to be retried."

Although the learned counsel on both sides presented very able briefs on the various questions arising upon the trial of the cause, and this question is barely mentioned in the brief of the learned counsel of the appellant, without the citation of any authorities, and the learned counsel of the respondent does not even allude to it, it is of too much importance to be ignored by this court, and the practice ought not to be encouraged by silence. The circuit court must proceed in the hearing of appeals from judgments of justices of the peace, where the plaintiff's claim and the judgment are less than \$15, strictly according to the directions of the statute, or the proceedings will be void. The case must be heard on the original papers, and the return of the justice containing all the

Goddard vs. The Chicago & Northwestern R'y Co.

material evidence and his rulings in the action, "and on giving judgment the circuit court may *affirm* or *reverse* the judgment of the court below, in whole or in part, either as to damages or costs, or both, as to any or all parties, and for errors of law or fact." "To the copy of every such judgment, upon an appeal, there shall be annexed the return upon which it was heard, which shall be filed with the clerk of the court and constitute the judgment roll," etc. Sections 3767 and 3769, R. S. On this appeal the circuit court disregarded all of these provisions of the statute, and tried the action, which was in that court only on appeal, as an original action, and rendered a judgment unauthorized in such a case. The judgment is void for the want of jurisdiction in the court to render it, and must be reversed.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for further proceedings according to law.

GODDARD vs. THE CHICAGO & NORTHWESTERN RAILWAY
COMPANY.

February 15 — March 14, 1882.

COURT AND JURY. *Question of negligence improperly submitted.*

Defendant's fence between its track and plaintiff's pasture was swept away by a flood, which was at its height about eight days before plaintiff's horses were injured on said track. During the three days immediately preceding the injury, the water along the line of the fence had fallen at the rate of nearly eight inches each day; and at the time of the injury it had not subsided so as to leave the entire line of the fence at the place in question uncovered. The jury found that a new fence might have been properly and reasonably constructed two days before the injury. *Held*, that the court erred in submitting to them the question whether the defendant company was negligent in neglecting to rebuild the fence.

Goddard vs. The Chicago & Northwestern R'y Co.

APPEAL from the Circuit Court for *La Crosse* County.

Action for the killing of plaintiff's horses by a train of cars belonging to and run by the defendant on the Green Bay & Minnesota railroad. The complaint alleges that the horses had strayed upon said road by reason of the failure of the Green Bay & Minnesota Railway Company, and of the defendant, to build and maintain good and sufficient fences, as by law required, on both sides of said railroad; and it also alleges negligence in running the train. The answer denied negligence on the part of the company, and alleged negligence on plaintiff's part. There was a verdict for the plaintiff; a new trial was refused; and defendant appealed from a judgment on the verdict.

The only alleged error passed upon by this court will sufficiently appear from the opinion.

Wm. F. Vilas, for the appellant.

Benjamin F. Bryant, for the respondent.

COLE, C. J. Assuming, as we shall do without discussion, that the statute imposed upon the defendant corporation the duty of maintaining a proper fence along the road where the horses escaped onto the track, we still think there was no sufficient evidence showing that it had been guilty of negligence in the discharge of that duty. It is an admitted fact — indeed, the jury so find — that there had once been a sufficient fence between the plaintiff's land and the railroad track; but this fence had been thrown down or destroyed by the unusual flood which occurred in June of the season the horses were injured. It was conclusively proven, by the evidence on both sides, that the high water flooded all of the low lands in that vicinity, especially the eastern part of the plaintiff's enclosure, where the horses were being depastured. In fact, it appeared that the water was so high as to completely cover the fence between that enclosure and the railroad track in some places. As a consequence, the fence along the track at that point was

Goddard vs. The Chicago & Northwestern R'y Co.

thrown down or washed away. There is really no dispute about these facts. It is not claimed that the defendant, by the exercise of any reasonable care, could have guarded its fences against the effects of such an extraordinary flood. But as affecting its liability one question was, whether it had negligently omitted to repair or rebuild the fence after the flood had subsided. This seems to have been the only ground of negligence which was relied on, upon the trial, to sustain the action.

In answer to certain questions which were submitted by the circuit court, the jury found that the flood was at its height about eight days before the horses were injured, and that at the time they were injured the flood had not subsided so as to leave the entire line of the fence between the plaintiff's land and the railroad uncovered by water. And in answer to the sixth question — whether a fence could have been properly and reasonably constructed, in place of that destroyed by the flood, before the injury, and if so how long before,— the jury said: "Yes; two days." The horses were injured some time during the night of the 27th of June. It appears from the evidence that the water began to fall June 20th, and from that day to the 28th, both days inclusive, had fallen four feet and nine inches. On the 25th it fell eight inches; on the 26th, eight; and on the 27th, seven. Now, upon these undisputed facts, and in view of the finding of the jury, it seems to us impossible to impute actionable negligence to the defendant by reason of its failure to rebuild the fence before the accident happened.

The defendant, of course, was entitled to a reasonable time after notice of the destruction of the fence, and after the water had subsided, to rebuild it. It could not reasonably be expected that the defendant would go to work to replace the fence before the water had subsided and the ground had become sufficiently dry to sustain the posts. It was conclusively shown that the water fell nearly two feet the last three days

Moon vs. McKnight, imp.

before the horses escaped from the enclosure onto the track, and then it had not receded from the entire line of the division fence, as found by the jury. It seems to us the court should, as a matter of law, have held that there was not sufficient evidence of negligence on the part of the defendant to warrant a recovery. It is true, in the charge the learned circuit court directed the jury that whether the defendant had failed to exercise ordinary care and diligence in rebuilding the fence must be determined from all the facts and circumstances surrounding the transaction, and that the defendant would not be liable unless it had neglected or failed to rebuild the fence within a reasonable time after notice of its destruction. In view of the undisputed facts, the court should have held that there was no evidence of negligence on the part of the defendant which should be submitted to the jury.

By the Court.—The judgment of the circuit court is reversed, and a new trial ordered.

MOON vs. MCKNIGHT, imp.

February 16—March 14, 1882.

Joinder of Causes of Action.

An action against A. and B., who are husband and wife, and X., who holds a mortgage of land from B., to have a prior deed from A. and B. to plaintiff, absolute on its face, declared a mortgage, to have a subsequent recorded deed purporting to have been executed by plaintiff to B., conveying to her the same land, set aside as a forgery, and to have plaintiff's mortgage foreclosed against all the defendants, does not improperly unite different causes of action.

APPEAL from the Circuit Court for *Trempealeau* County.

The defendant *McKnight* appealed from an order overruling his general demurrer to the complaint. The substance of the complaint is stated in the opinion.

Moon vs. McKnight, imp.

For the appellant there was a brief by *Ellis & Salisbury*, and oral argument by *B. W. Jones*.

For the respondent there was a brief by *Marshall & Jenkins*, and oral argument by *Mr. Marshall*.

ORTON, J. The statements of the complaint, so far as necessary to an understanding of the question raised on this appeal, are substantially as follows: On the 24th day of March, 1877, Samuel Moon was indebted to the plaintiff in the sum of \$945.80, to become due March 24, 1880, and to secure its payment the said Samuel Moon and Adelia Moon, his wife, executed an absolute deed of the premises described to the plaintiff, and there was an agreement between the parties that, upon the payment of the debt and interest, said premises should be reconveyed. Afterwards an absolute deed purporting to have been executed by the plaintiff and his wife to the said Adelia Moon, of said premises, was placed upon the record of deeds of the county, and said Adelia Moon executed a mortgage upon said premises to the defendant *McKnight* to secure a loan of money from him to said Samuel Moon. The plaintiff and wife, or either of them, never executed or acknowledged said deed, and had no knowledge of the same except by said record, and said deed was a forgery. The prayer is to cancel said deed and remove the record thereof, and for foreclosure. The defendant *McKnight* demurred to said complaint on the ground "that several causes of action are improperly united, to wit, a cause of action for the foreclosure of a mortgage with a cause of action to set aside a fraudulent or forged conveyance," and the demurrer was overruled by the circuit court.

Several causes of action may be united in the same complaint, "where they arise out of the same transaction or transactions connected with the same subject of action." Section 2647, subd. 1, R. S. All of the defendants are interested adversely to the plaintiff in respect to the same matters,

Moon vs. McKnight, imp.

and therefore necessary parties. The defendant *McKnight* is a subsequent mortgagee and a proper party, and he is especially interested in the question of the validity of the deed to Adelia Moon; for if that deed is valid, he is then the sole mortgagee, and if invalid, he is only a subsequent or junior mortgagee. That deed, if valid, operated to discharge the plaintiff's mortgage, so that this complaint is virtually to cancel a discharge of the plaintiff's mortgage on the ground that it is a forgery. This relief is essential, and a prerequisite to the plaintiff's right of foreclosure. When there is a common liability and a common interest in the property, or different claims to the property, in the defendants, and the subjects may be joined without inconvenience, they may be joined in one suit. Story, Eq. Pl., § 533. A deed may be declared a mortgage, and the mortgage foreclosed, in the same action. *Yates v. Yates*, 21 Wis., 473. Where the prayers are all consistent with each other, the matters may be joined. *Hungerford v. Cushing*, 8 Wis., 332. The defendant in a mortgage foreclosure, claiming that a trust deed of the premises executed to a third person is prior to the mortgage in suit, has a right to have that question determined in the action, and for that purpose to have the grantee in such deed made a defendant. *Baass v. Railway Co.*, 39 Wis., 296. The plaintiff might have brought three actions: (1) to have the first deed declared a mortgage; (2) to have the second deed declared void because a forgery, and to have it cancelled; (3) to foreclose the mortgage. In all of these suits all of these defendants would be directly interested and necessary parties. The defendants might well complain of such a multiplicity of actions, and the consequent costs, when all these three objects so connected together and dependent upon each other, and all necessary to the final relief of foreclosure, may be obtained as well in one suit. It is one of the main principles of equitable relief, to prevent a multiplicity of actions. Story's Eq. Pl., § 287. We

Houghton vs. Milburn and wife.

have said more than necessary to sustain the ruling of the circuit court.

By the Court.—The order of the circuit court is affirmed, and the cause remanded for further proceedings according to equity.

Houghton vs. Milburn and wife.

January 11—April 5, 1882.

PRACTICE. (1) *Motion virtually disposed of.*

CONTRACTS. (2:1) *Covenant to maintain third person, construed.* (2:2)

Moneys paid in consideration thereof, not a trust fund: (2:3) *Who may sue on such covenant.*

MARRIED WOMAN. (3) *Joint covenant with her husband: separate estate.*

1. An order confirming a referee's report is in effect a denial of a motion to set the report aside.
2. An agreement between A. H. of the one part, and P. H., his wife, and the defendants of the other part, after reciting the permanent separation of A. H. and P. H., contains a covenant by A. H. with the second party that he will permit P. H. to reside in such place and family as she may from time to time choose; that he will, at the onsealing and delivery of said agreement, pay to defendants \$1,000, "in full for the support and maintenance" of P. H., "for her sole use and benefit forever;" that not more of said sum than \$125 shall be paid or expended by defendants to or for the use of P. H. in any one year, except in case of sickness, etc.; and that "all sums on hand and unexpended shall be kept on interest for the purpose of accumulating a capital for such use as is hereinbefore provided." The agreement then contains a covenant by the second party to "accept and take the said sum of \$1,000 in full satisfaction for the said P. H.'s support and maintenance," and also a covenant by defendants to indemnify A. H. against all claims of P. H. for dower, etc., and against her debts. *Held,*

(1) That P. H. (or her guarlian for her, after his appointment) was at liberty, as against defendants, to select her place of residence, and defendants are bound to pay for her maintenance at such place to the extent provided in the agreement.

Houghton vs. Milburn and wife.

(2) That the defendants do not hold the \$1,000 as a trust fund, chargeable only in equity, but are liable in an action *at law* upon their covenant for the maintenance of P. H.

- (3) That under the well settled law of this state, such action upon defendants' covenant may be brought by any person who has furnished P. H. with maintenance, so far as the same was not furnished gratuitously.
8. Where a certain sum of money was paid to a husband and wife, and in consideration thereof they covenanted to support and maintain one X. during the remainder of her natural life: *Held*, that the wife's interest in the sum so paid is her separate estate, and she is liable upon the covenant as well as her husband.

APPEAL from the Circuit Court for *Trempealeau* County.

Aaron Houghton and Polly, his wife, having separated, and having mutually agreed that such separation should be permanent, an agreement under seal was entered into between Aaron, of the one part, and Polly and the defendants, of the other part, providing for the separate maintenance of Polly. The defendants are husband and wife. *Mrs. Milburn* is the daughter, and the plaintiff is the son, of Aaron and Polly. The agreement bears date May 29, 1875. It recites the separation of Aaron and Polly, and contains the following covenants: "Now, therefore, the said party of the first part, in consideration of the premises and in pursuance thereof, doth hereby covenant, promise and agree to and with the said *William Milburn* and *Caroline S. Milburn* and Polly Houghton, his wife, that he shall and will allow and permit his said wife to reside and be in such place or places, and in such family and families, as she may from time to time choose or think fit to do; and that he shall not, nor will at any time, sue, molest, disturb or trouble any person whomsoever for receiving, entertaining or harboring her. And that he will not claim or demand any of her jewels, money, plate, clothing, household goods or furniture, which the said Polly Houghton hath in her power, custody or possession, or which she shall or may at any time hereafter have, or which shall be delivered or given to her, or that she may otherwise acquire. And further, that the said

Houghton vs. Milburn and wife.

party of the first part shall, at or before the ensembling and delivery hereof, pay or cause to be paid to the said *William Milburn* and *Caroline S. Milburn* the sum of \$1,000, in full for the support and maintenance of his wife, for her sole use and benefit forever. And that not more of the said sum than \$125 shall be paid, laid out or expended by the said *William Milburn* and *Caroline S. Milburn* to or for the use of the said Polly Houghton in any one year, unless it be in case of sickness or other pressing necessity, in which case a sufficiency may be used to relieve want and make her comfortable. And all sums on hand and unexpended shall be kept at interest for the purpose of accumulating a capital for such use as is hereinbefore provided. And the said *William Milburn* and *Caroline S. Milburn* and Polly Houghton do hereby agree to accept and take, and do hereby accept and take, the said sum of \$1,000 in full satisfaction for the said Polly Houghton's support and maintenance, whether in sickness or in health."

The instrument contains covenants of the defendants to indemnify Aaron Houghton against all claims of said Polly Houghton, whether for dower or otherwise, and against her debts. In January, 1856, Aaron and Polly were, by the judgment of the circuit court, duly divorced from the bonds of matrimony. The \$1,000 mentioned in the above contract was paid by Aaron to the defendants. From the time said contract was made until January, 1879, Mrs. Houghton resided portions of the time with the defendants and portions of the time with her other children, including the plaintiff. She first went to the defendants' to reside in May, 1878. Since January, 1879, she has resided constantly with the plaintiff. This action was brought by the plaintiff against *William* and *Caroline S. Milburn* to recover compensation for her maintenance during the times she resided with the plaintiff. The complaint states the expenditures of the plaintiff for the maintenance of Mrs. Houghton, and claims to recover the same under and by virtue of the covenants in the aforesaid instrument. The answer

Houghton vs. Milburn and wife.

of the defendants alleges that they accepted the \$1,000, to be applied by them as trustees to the separate support of Mrs. Houghton, according to the conditions of such contract, and denies that they agreed to support her. The cause was tried before a referee, who in due time made and filed his report. The plaintiff moved the court to set aside the report, and the defendants moved for judgment upon it. The motions were argued together. The court made an order modifying the report in certain particulars, and confirming it as modified, and ordered judgment for the defendants. The plaintiff appealed from the judgment entered pursuant to such order. The grounds of the judgment are stated in the opinion.

For the appellant, there was a brief by *Button Brothers*, and oral argument by *W. F. Vilas*.

Edwin White Moore, for the respondents, argued, among other things, that the instrument providing for the separate maintenance of Polly Houghton bound the respondents simply as trustees of the fund therein mentioned and placed in their hands, and they could only be reached by an action in equity to require them to perform the duties of the trust as laid down in the instrument. The only engagements made therein by them were to indemnify Aaron Houghton against the debts of Polly Houghton, and to procure release of dower, etc., from her as desired by Aaron Houghton. This contract of the trustee to indemnify the husband against debts on account of the wife was long considered indispensable to the validity of a contract by the husband for the separate maintenance of the wife. It was supposed that a contract between the husband and wife directly, for such a purpose, would not be binding, and consequently a third person was introduced, with whom the husband contracted as trustee in behalf of the wife. In order to furnish a consideration from the trustee for the contract of the husband, he made this contract of indemnity. The third person is invariably spoken of as trustee, and the wife as *cestui que trust*. The instrument in this case is of similar

Houghton vs. Milburn and wife.

form, and for the same purpose as those referred to and used in England in all such cases. *Baynon v. Batley*, 8 Bing., 256; *Jee v. Thurlow*, 2 B. & C., 547; *Rolette v. Rolette*, 1 Pin., 370. It was afterwards held, however, that such trustee was not necessary to the validity of the contract, that the husband might contract directly with his wife for her separate support, and would in such case be regarded as trustee of the sum to be paid for the benefit of the wife, and that the trust thus created would be enforced in equity. Such a contract was, however, still exclusively the subject of equity jurisdiction. Cord's Legal & Eq. Rights of M. W., secs. 120-130; Story's Eq. Jnr., sec. 1248; Reeve's Dom. Rel., 104; Tyler on Inf. & Cov., sec. 340. The agreement to indemnify Aaron Houghton can be of no avail to the appellant. He does not claim by any privity with Aaron Houghton, and all the liability claimed by him has been incurred since the divorce, which, of course, relieved Aaron Houghton from all liability for such debts. No action at law to charge the respondents personally can be maintained upon an account made with the *cestui que trust*. Even if the fund were liable for the debt, a valid claim, if not a judgment, against Polly Houghton must first be shown, and resort must then be had to a court of equity to have a portion of the fund applied to its payment. If the trustees were to be held liable individually to this creditor for a fixed sum independent of the amount of the fund in their hands, they might also be held liable to others, and so, instead of being simply held to a proper use of the money placed in their hands as trustees, they would become personally involved to an indefinite amount, while the funds held in trust would be wholly lost sight of.

The following opinion was filed February 7, 1882:

LYON, J. I. A question of practice will first be disposed of. The court did not, in express terms, deny plaintiff's motion to set aside the report of the referee; and it is claimed

Houghton vs. Milburn and wife.

that the omission is fatal to the judgment. *Fairbank v. Newton*, 46 Wis., 644, is cited to support this position. The precise point decided in that case is, that confirmation of the report of the referee must precede a judgment entered pursuant to such report, or the judgment cannot be upheld. In this case the report as modified was confirmed by the court. In substance and effect such confirmation was a denial of the motion to set the report aside. It was so held in *Lemke v. Daegling*, 52 Wis., 498. The cases are not distinguishable.

II. The judgment of the circuit court is based upon two propositions found by the court, to wit: *first*, that the defendants were ready and willing to furnish Mrs. Houghton suitable and proper maintenance at their home, and were not bound by their covenant to furnish it elsewhere; and *second*, that the expenses incurred by the plaintiff for the maintenance of his mother were incurred gratuitously. If either of these findings is correct, the judgment should not be disturbed.

1. The contract of May 29, 1875, fairly construed, we think, gives Mrs. Houghton the right to reside where she pleases, and to charge the defendants to the extent of \$125 *per annum* for her maintenance, and in case of her sickness or other pressing necessity for a larger sum. By the terms of that instrument Aaron Houghton covenanted that his wife should have the right to choose her own residence at her pleasure, and no right is reserved therein to the defendants to control her in that behalf. In fact, according to the testimony of the defendant husband, Mrs. Houghton did not reside with the defendants for three years after the contract was made, but during that time resided with her other children, and the defendants paid for her maintenance during that time without objection on their part. This shows that they understood the contract as we think it should be interpreted. We conclude, therefore, that the first finding above stated cannot be sustained.

Houghton vs. Milburn and wife.

2. It appears that in 1878 the plaintiff was duly appointed guardian of the person of his mother; also that she is very aged and infirm. If her intellect is so enfeebled that she cannot make intelligent choice of her residence, it would seem that her guardian may choose for her. The proof is quite satisfactory that both herself and her guardian were desirous that she should live with the plaintiff; at least, from and after January, 1879, when she went there the last time.

There is sufficient evidence to support the finding that the plaintiff maintained Mrs. Houghton gratuitously up to January, 1879. The testimony is conflicting on the subject, and quite evenly balanced. In such a case the rule is that the finding must stand. But in respect to the plaintiff's expenditures in that behalf after January, 1879, there is no conflict in the testimony. The defendant husband admits in his testimony that in that month the plaintiff made claim upon the defendants for the maintenance of his mother at the rate of \$125 per annum. There is no foundation, therefore, for the finding that the plaintiff supported her gratuitously, so far as the expenses of her maintenance after that date are concerned. To that extent the finding cannot be upheld.

III. It is argued by the learned counsel for the defendants that this action at law cannot be maintained by the plaintiff to recover for the support of Mrs. Houghton; that if he has any remedy, it is in equity only. The argument is founded upon the assumption that the \$1,000 paid to the defendants by Aaron Houghton, pursuant to the contract of May 29, 1875, is a trust fund in their hands, of which Mrs. Houghton is the beneficiary; and that this action was brought to charge that fund.

Granting the soundness of the premises, there would be great force in the argument. But we do not think that the \$1,000 is a trust fund in the hands of the defendants. They expressly accepted it in full satisfaction for the support and maintenance of Mrs. Houghton. There is nothing in the con-

Houghton vs. Milburn and wife.

tract that looks like a trust except the clause requiring the unexpended money to be kept on interest for the purpose of increasing the amount so paid to the defendants for the benefit of Mrs. Houghton. It is reasonable to believe that this clause was inserted as a security or guaranty that the fund should not be squandered, but that it and the accumulated interest should be safely kept for the uses and purposes intended. Had the parties intended to create a trust, very different language would have been employed. We think the money belongs absolutely to the defendant. Had Mrs. Houghton died after the contract was made, and before the defendants had expended a dollar of it, neither Aaron Houghton nor the heirs of Mrs. Houghton could have recovered the money of the defendant. The money was paid absolutely and unconditionally to them, and it thereby became absolutely and unconditionally their money. The consideration for such payment was their agreement to support and maintain Mrs. Houghton. An action may be maintained in a proper case for a breach of such agreement, but not to charge the defendants as trustees in respect to the money paid them as the consideration for their agreement.

The rule is thoroughly established in this state and elsewhere, that when one person, for a valuable consideration, engages with another to pay money to or do any other act for the benefit of a third person, the latter may maintain an action against such promissor for a breach of his engagement. *Hodson v. Carter*, 3 Pin., 212; *Cotterill v. Stevens*, 10 Wis., 422; *Cook v. Barrett*, 15 Wis., 596; *Kimball v. Noyes*, 17 Wis., 695; *Putney v. Farnham*, 27 Wis., 187. This rule applies as well to covenants under seal as to simple contracts. *McDowell v. Laev*, 35 Wis., 171; *Bassett v. Hughes*, 43 Wis., 319.

The covenant of the defendants, contained in the instrument of May 29, 1875, is, in substance and legal effect, a covenant to pay to any person with whom Mrs. Houghton chooses to

Houghton vs. Milburn and wife.

reside, the expenses incurred by such person for her maintenance, within the limitation of the contract, which is \$125 *per annum*, unless, in case of her sickness or other pressing necessity, more shall be required. We think the plaintiff is within the rule above stated in respect to the expenses incurred by him for her support after January, 1879, and may maintain this action therefor. Of course he cannot recover expenses gratuitously incurred. Neither can he recover more than at the rate of \$125 *per annum* unless he proves the facts which, under the contract, justify and require a larger expenditure. The testimony preserved in the bill of exceptions does not satisfactorily show that such facts existed after January, 1879.

The referee found the aggregate amount of all the expenses incurred by the plaintiff on account of his mother's maintenance, but not of the portion thereof incurred after January, 1879. We are unable to determine such portion from the testimony. A new trial must therefore be ordered. This is a controversy between a brother and a sister and her husband, over the cost of the food which their aged mother eats, the garments which she wears, and the medicines which her infirmities require. It banishes the daughter from her mother's presence and society, and deprives the latter of those kindly offices which a daughter can best bestow. It plants the seeds of bitterness and hate in the family, and banishes sympathy and love. It is an unseemly controversy, and ought to be ended at once. No doubt the parties regret that it exists, and would gladly terminate it and resume their former pleasant fraternal relations. We shall be pardoned for earnestly counselling them to do so, and to that end to make mutual concessions, and, if necessary, to avail themselves of the aid and advice of discreet mutual friends.

By the Court.—The judgment of the circuit court is reversed, and the cause will be remanded for a new trial.

Houghton vs. Milburn and wife.

Upon a motion for a rehearing there were briefs, by *Button Brothers* for the appellant, and by *Edwin White Moore* for the respondents.

For the respondents it was argued that *Caroline S. Milburn* is and was a married woman and not liable on the contract. *Manhattan B. & M. Co. v. Thompson*, 58 N. Y., 80; *Robinson v. Rivers*, 9 Abb. Pr. (N. S.), 144; *Nash v. Mitchell*, 71 N. Y., 199; *McVey v. Cantrell*, 70 id., 297; *Huyler v. Atwood*, 26 N. J. Eq., 504; *Heath v. Van Cott*, 9 Wis., 516; *Yale v. Dederer*, 18 N. Y., 265; *Todd v. Lee*, 15 Wis., 368; Wells on Mar. Women, sec. 316; *Harshberger v. Alger*, 31 Gratt., 52; *O'Daily v. Morris*, 31 Ind., 111; *Bank v. Partee*, 99 U. S., 325; *Whitworth v. Carter*, 43 Miss., 61; *Barnum v. Young*, 10 Neb., 309; *Maguire v. Maguire*, 3 Mo. App., 458; *Hanse v. De Witt*, 63 Barb., 53; *Pippen v. Wesson*, 74 N. C., 437; *Stillwell v. Adams*, 29 Ark., 346; *West v. Laraway*, 28 Mich., 464; *Neef v. Redmon*, 12 Reporter, 434. This contract cannot be held to be for her benefit, nor has it any connection with her separate property. Being signed by husband and wife, it is the contract of the husband alone. *Shartzer v. Love*, 40 Cal., 93; *Swasey v. Antram*, 24 Ohio St., 87. *

The motion was disposed of by the following opinion filed April 5, 1882:

LYON, J. The judgment in this action, for the defendants, was reversed as to both of them. The defendant *Caroline S.* now moves for a rehearing of the cause, on the ground that she was a married woman when the contract which is the basis of the judgment was entered into, and hence that she is not bound by it. This point was made in the brief of counsel for the defendants, but was not argued, and it was not noticed in the opinion reversing the judgment.

In *Dayton v. Walsh*, 47 Wis., 113, it was held that a married woman, having no separate estate, might purchase a farm of some person other than her husband, entirely on credit, and

Houghton vs. Milburn and wife.

the farm and proceeds thereof would constitute her separate property.

In *Conway v. Smith*, 13 Wis., 125, it was held that a married woman is liable in actions at law on her contracts relating to her separate estate, necessary or convenient to its enjoyment. By chapter 155, Laws of 1872, the earnings of a married woman, except for labor performed for her husband, are declared to be her separate property. R. S., p. 660, sec. 2343.

It was held in *Meyers v. Rahte*, 46 Wis., 655, that since the enactment of that statute a married woman may carry on business in her own name and for her own benefit, and may make valid contracts in respect thereto, which may be enforced at law in actions against her. See also *Krouskop v. Shontz*, 51 Wis., 204.

The principles of the above cases apply to this case. The one-half interest of *Mrs. Milburn* in the \$1,000 which she and her husband received from her father for the future maintenance of her mother, constituted her separate estate, the same as a stock of goods, or a farm purchased by her on credit, would be separate estate. The money came from a source other than her husband; and it is not perceived how the circumstance that her husband had a joint interest with her in the money can affect her liability. Her interest in the money being her separate estate, it follows that an action at law may be maintained against her, jointly with her husband, on their covenant to support her mother. This action is based upon that covenant, and we hold that it may be maintained against her as well as against her husband.

By the Court.—The motion for a rehearing is denied.

Rumery vs. McCulloch, Garnishee, etc.

RUMERY vs. McCULLOCH, Garnishee, etc.

March 14—April 5, 1882.

GARNISHMENT: GENERAL ASSIGNMENT. (1) *Res adjudicata by suit against principal debtor.* (2) *Substitution of debtor.* (3, 4) *General assignment, defective as against creditors, valid as between parties. Power of one partner as to partnership property.* (5) *Validity of subsequent assignment by one partner to cure defect in first.*

1. It is *res adjudicata* by the finding and judgment in the action of this plaintiff against the principal debtors, constituting the firm of G. P. & Co., that said firm are liable to pay the former indebtedness of the firm of P., H. & Co. to said plaintiff; and, in this action against the general assignee of G. P. & Co., plaintiff may impeach the validity of the assignment, but not on the ground that he is a creditor of the earlier firm.
- [2. *Quære*, whether plaintiff, after availing himself of the agreement of G. P. & Co. to pay the debts of P., H. & Co., can hold for such debts one of the last named firm, not included in the new firm.]
3. A general assignment for the benefit of creditors, inoperative as against creditors from a defect in the justification of the sureties on the assignee's bond (*Smith v. McCulloch*, 42 Wis., 564), held valid as between the parties thereto, to pass the property to the assignee, in trust.
4. One of two partners, with the consent of the other, may convey real estate of the firm by an assignment under seal, in the name of the firm.
5. An assignment with defective justification of the sureties was of partnership property, executed by both partners; the firm was insolvent, and went out of business; and one partner left the state, and went to reside in Canada. Afterwards the other partner, without the knowledge of such non-resident, executed in the firm name a second assignment of the same property to the same assignee; and this was in all respects regular, and was (like the first) without preference, and was made to correct the defect in the first. There had been no reconveyance by the assignee, and no rights had intervened. Held, that the assignment was valid for all purposes.

APPEAL from the Circuit Court for Portage County.

In October, 1878, the plaintiff recovered a judgment against the defendants Park and Bigler on an indebtedness due him from the firm of Parks, Homsted & Co., which firm consisted of said defendants and one Homsted. At the time of the

Ramery vs. McCulloch, Garnishee, etc.

commencement of the action, in September, 1877, the respondent *McCulloch* was summoned as garnishee of Parks and Bigler, and the trial of the issue on his liability as such garnishee, in November, 1879, resulted in a judgment in his favor. From that judgment the plaintiff appealed. Other facts will sufficiently appear from the opinion.

C. W. Felker, for the appellant.

For the respondent there were briefs by *Jones & Sanborn*, and oral argument by *D. Lloyd Jones*.

ORTON, J. The main action in which the garnishee proceedings were instituted was not against Parks, Homsted & Co., and Homsted was not made a party thereto. It was in form, so far as the title was concerned, against George Parks and J. H. Bigler. The averments of the complaint, so far as material to the present inquiry, were, that George Parks and J. H. Bigler agreed to pay all of the debts of Parks, Homsted & Co., in consideration of the retirement of Homsted from the firm, and their retention of all of the property and assets of the old firm, and that the note in suit was one of the debts which they agreed to pay; that George Parks and J. H. Bigler continued the business of the old firm, and became and continued partners under the firm name of George Parks & Co.; and that they retained all of the property and assets of the firm of Parks, Homsted & Co. These averments, taken together, substantially charge the firm of George Parks & Co. with the liability to pay this note of Parks, Homsted & Co. by virtue of said agreement. Parks was not served with process, and Bigler answered, denying such agreement to pay the debts of the old firm by George Parks & Co.; and the court found that none of the allegations of his answer were true, and rendered judgment against both Parks and Bigler, and ordered that the money be made out of their joint property, and out of the separate property of Bigler. This judgment was, therefore, substantially against George Parks & Co., following the complaint,

Rumery vs. McCulloch, Garnishee, etc.

and based upon said agreement. The plaintiff, therefore, not only thereby became a judgment creditor of George Parks & Co., but the finding of the court upon the issue formed by the allegation and denial of said agreement, and the judgment of the court in the action, establish the fact that such agreement was made as alleged, and such fact became thereby *res adjudicata*. Therefore, from the time of the formation of the partnership of George Parks & Co., the note in suit has constituted one of the debts of the firm. On the trial of the issue formed on the answer of the garnishee, Bigler was allowed to testify that no such agreement was made, and the court found in due form that George Parks & Co. never assumed or agreed to pay the co-partnership debts of the firm of Parks, Homsted & Co. This finding was not only immaterial and irrelevant to the issue, but contrary to the fact, which was *res adjudicata* in the main action. It follows that the plaintiff was one of the creditors of George Parks & Co. when both assignments were made by them for the benefit of their creditors, and may attack their validity, but he cannot question their right to make them on the ground that he is a creditor of the old firm of Parks, Homsted & Co., any more than the garnishee can deny his right to question their validity on that ground. There may be a question whether the plaintiff can hold Homsted as one of the old firm, now or hereafter, since he has availed himself of the agreement of George Parks & Co. to pay his claim, on the principle of novation. But if he may still pursue Homsted, it would be merely resorting to an additional security, which other creditors of George Parks & Co. do not have, and for that reason he certainly has no right to complain of their assignments.

We have had some difficulty in arriving at the real situation and legal bearings of the case on account of the uncertain and confused allegations of the complaint in the main action and the complications of the record; but we think the above is substantially the correct view to be taken of the whole case, and the plaintiff's legal relations to the assignments.

Rumery vs. McCulloch, Garnishee, etc.

In this view of the case, the plaintiff in this garnishee proceeding stands in relation to George Parks & Co., and their two assignments, as an attaching creditor seeking a preference against the assignments which were made for the benefit of all the creditors alike, including himself, and attacking their validity. It appears that Homstead retired from the firm and George Parks & Co. succeeded to all of the property and business of the late firm in September, 1875, and in December following George Parks & Co. made an assignment to the defendant garnishee of all of their property, rights, credits and effects, for the benefit of their creditors without preference. This assignment appears to have been made according to the requirements of the statute, and to have been valid in all respects, except in the affidavit of justification of the sureties upon the assignee's bond, which omitted to state that their property was within the state; and for this reason it was held invalid by this court in *Smith v. McCulloch*, 42 Wis., 564. It further appears that the assignee took full possession of all of the property of George Parks & Co. under that assignment, and proceeded to dispose of the same and make due application of the proceeds thereof, until said assignment was so declared void, and has continued to hold said property and the residue of the proceeds thereof until the present time; that soon after the execution of the first assignment the said Parks left the United States and went to the dominion of Canada for permanent residence therein, and has never returned to this country; and that he abandoned all interest in or control over the property and business of George Parks & Co.; and that Parks and Bigler owned no other property jointly except that so assigned. Under these circumstances, J. H. Bigler, one of said firm, executed a second assignment in the name of the copartnership of all of their property in August, 1877, as he testified on the trial, "for the purpose of correcting the first assignment."

This assignment, so far as appears, was made without the knowledge of Parks, and is made without preference, and is in every respect regular and unquestionable except that it was

Rumery vs. McCulloch, Garnishee, etc.

made by one partner only. The defect on account of which the first assignment was held void as to attaching creditors, was not in the assignment itself; and, though declared invalid in consequence of the defect in the justification of the sureties on the bond, it was nevertheless valid as between the assignors and assignee, and the title to the property passed to the assignee in trust. *Burrill on Assign.*, 494; *Geisse v. Beall*, 3 Wis., 367; *Lincoln v. Cross*, 11 Wis., 91; *Fargo v. Ladd*, 6 Wis., 106. The second assignment cures and corrects the defect of the first, and they will both stand together—the first as having passed the title of the property, which had not been reconveyed to the assignors before the making of the new assignment; and the second to correct a defective bond in the first.

The case of *Brahe v. Eldridge*, 17 Wis., 184, is clearly in point on this question. In that case, upon the discovery of the defect in the bond, the assignee delivered back the property, and there was a new assignment made, which cured the defect. There was no reconveyance of the property before the second assignment, and it was contended that there was, therefore, no property in the assignors to pass by the second assignment. This court, by Mr. Justice PAINÉ, held that, even if that was the case, the property passed by the first assignment, and that was sufficient. In this case the property has remained in the assignee, both as to title and possession, since the execution of the first assignment. The above case answers fully the point, made by the learned counsel of the appellant, that the first assignment dissolved the partnership, and therefore it could make no new or other assignment. The mere granting part of the assignment, by which the assignee obtains his title in trust, is the same in both, and the second is but a repetition of the first. The defect corrected was in the justification of the sureties to the bond, which, it would seem, one partner, as the agent of his copartners, might correct at any time without their special assent; but this, however, we do not decide. *Sumner v. Hicks*, 2 Black (U. S.), 532.

Rumery vs. McCulloch, Garnishee, etc.

We may, however, presume and infer, from the execution of the first assignment by Parks, his design and intention to make an effectual assignment, and imply therefrom authority and consent that such assignment should be made by Bigler effectual for the purposes expressed in it, and to correct the same, if necessary to that end, either by another assignment or in any other proper way; and we think it proper to hold, in his case, that such authority and consent are clearly implied, because Parks has never made any objection to either assignment, and no rights have intervened between the first and second assignments, which would render the making of the second, for the purpose of correcting the first, wrong or improper.

It may be said here, in answer to the objection that one partner cannot assign real property without the express assent of the other partners, and cannot bind his copartners under seal, that the title to the real estate, if the partnership had any, passed by the first assignment to the assignee; but if it has not passed at all, then the plaintiff can have his remedy upon it by execution or attachment, and the assignment will remain valid without it. *Bates v. Ableman*, 13 Wis., 644; *Estabrook v. Messersmith*, 18 Wis., 545. But finding as we do that the absent partner, Parks, had impliedly consented to the making of the second assignment and authorized it, the other partner, Bigler, could execute the assignment under seal so as to transfer the real estate of the firm. *Waterman v. Dutton*, 6 Wis., 265; *Wilson v. Hunter*, 14 Wis., 683.

Again, if the last assignment did not transfer the real estate, and it did not pass to the assignee by the first, then it follows that the assignee, *McCulloch*, does not hold it and cannot be made to answer for it as garnishee.

But aside from the above propositions the question remains whether Bigler, one of the partners, had the right under the circumstances to make the second assignment. The learned counsel of the appellant states correctly the law in his brief, that "mere absence of a non-executing partner does not give by implication a power to the partner present to execute an

Rumery vs. McCulloch, Garnishee, etc.

assignment to a trustee for the benefit of creditors." This is clearly implied in the case of *Brooks v. Sullivan*, 32 Wis., 444. In that case the non-executing partner was not actually present, but was within convenient reach and might have been consulted; and it was because he was in the city and might have been consulted and was not, and did not join in the execution of the assignment or assent to it, that it was held invalid. The counsel of the appellant in that case claimed in his brief that, "whenever an assignment has been sustained that was executed by less than the whole number (of the partners), the circumstances of the case have been such that the remaining partner was held to have *consented* to the assignment, as where one partner had *absconded* or was *traveling in foreign countries*, so that he could not be consulted in an emergency, and the responsibility of the business was thrown entirely on the remaining partners." To this statement of the law a great number of authorities were cited.

In Parsons on Partnership, § 166, the learned author, upon a review of the authorities, states in his text: "We think the weight of authority sanctions his (one partner's) assigning the whole property in trust for all the creditors, especially if this be done without preference of any kind;" and in his note to this text he says: "As to what is actually established by the cases, it seems to be pretty generally admitted and laid down that one partner may make a valid general assignment of all the partnership property to trustees for creditors, if such an act is justified by the situation of the firm at the time, and if the other partners are *absent from the country*, or have made the assignor sole managing partner, or if in any other way, expressly or by implication, they may be supposed to have conferred upon the assigning partner sufficiently extensive authority."

In *Brooks v. Sullivan*, *supra*, it seems to be implied that if the non-assigning partner is not present or so near at hand that he could at the time be consulted, the assignment would be valid if executed by one partner.

Rumery vs. McCulloch, Garnishee, etc.

In the leading case of *Anderson v. Tompkins*, 1 Brock., 456, one of the partners had embarked for England, and the remaining partner made an assignment with preferences, and it was held valid by the opinion of Chief Justice MARSHALL. This learned chief justice gave a similar opinion in *Harrison v. Sterry*, 5 Cranch (S. C.), 289, in a case where the non-assigning partner resided in London, England, and the assignment was made by his partner in the city of New York, where he had the management of the business. Following and approving this case, is the case of *Robinson v. Crowder*, 4 McCord (Law), 519, where some of the partners resided in Liverpool, England, who made the assignment, and the others in Charleston, South Carolina. The case of *McCullough v. Sommerville*, 8 Leigh, 415, was of a similar character, and *Anderson v. Tompkins* is especially approved.

In *Deckard v. Case*, 5 Watts, 22, the non-assigning partner had left the country, and the assignment was held valid for that reason. In *Fisher v. Murray*, 1 E. D. Smith (N. Y.), 341, it was held that an assignment by one partner without preference will be upheld if it be shown that it was made under circumstances that rendered it impossible to consult the other partners. In *Welles v. March*, 30 N. Y., 344, the non-assigning partner had absconded, and the assignment by the other was held good. Many other authorities might be cited to show that the last assignment, made by Bigler alone, after his partner, Parks, had conveyed away all his interest in the property of the firm, and had left the United States for permanent residence and business in another country, and had not returned, and the firm was insolvent and had suspended business, is a valid assignment and made upon sufficient implied authority.

By the Court.—The judgment of the circuit court is affirmed.

Miles vs. Ogden and another, imp.

MILES vs. OGDEN and another, imp.

March 14 — April 5, 1882.

PAYMENT. (1) *Application of payment.* (2) *Ratification of agent's act in accepting land as payment.* (3) *Debtor's services for creditor not a payment.*

1. R. held for collection a book account and also a note and mortgage against O. individually, and claims against O. and another as partners; and O. paid R. a sum in excess of said book account, to be applied on his individual indebtedness without further direction. *Held*, that R. was bound to apply the whole of said payment to O.'s individual debts then existing, and could not divert any part thereof to the payment of the firm debts, or of an indebtedness to be thereafter contracted by O.
2. When an agent, without authority, accepts a deed of land to his principal as a payment on a debt due the principal, a retention by the latter of the title is a ratification of the act.
3. Even where a creditor, who holds his debtor's note and mortgage, has become bound to pay for legal services rendered by the debtor, the value of such services cannot be set up as a *payment* in an action upon the securities, without proof of an express agreement, made by the creditor or with his authority, that the services should be treated as a payment.

APPEAL from the Circuit Court for Waupaca County.

On the 22d of November, 1873, the defendant *Ogden* was indebted to one R. R. Roberts upon a store account in the sum of about \$1,300, to secure the payment of which, together with about \$700 thereafter to be advanced to him by R. R. Roberts, *Ogden* executed the note and mortgage in suit, for \$2,000, on that day, and the same were taken by R. R. Roberts in the name of his daughter, *Mrs. Miles*, the mortgagee and the plaintiff in this action; and the amount of the note and mortgage was credited at the time on the store books and in the account of R. R. Roberts against *Ogden*. Two days after the execution and delivery of the note and mortgage, R. R. Roberts died, and thereupon the advances stipulated for were made by R. N. Roberts, a son of the deceased and a brother of the plaintiff, apparently out of the estate.

Miles vs. Ogden and another, imp.

Upon the death of the father, R. N. Roberts became the business manager and administrator of his estate, and took and held the note and mortgage for collection as the agent of the plaintiff. Nothing had been paid thereon up to January 12, 1875, when *Ogden* was indebted to the estate on open account in the sum of \$357.37, and the firm of Walsh & Ogden, of which he was a member, was also indebted to the estate upon current account over \$3,500; and the same firm was also indebted to R. N. Roberts, upon a bond mutually executed by the parties, over \$5,000.

On the 12th of January, 1875, *Ogden* paid to R. N. Roberts \$1,200, to be applied by him upon the indebtedness of *Ogden*, but without any direction as to the particular debt upon which the same was to be so applied. The circuit court applied \$357.37 of said \$1,200 in payment of *Ogden's* individual indebtedness at the store, to the estate, which was all that had then been incurred, and the balance thereof, to wit, \$842.63, upon the note and mortgage in suit, which was the only other individual indebtedness of *Ogden* then held by R. N. Roberts. The court also found that *Ogden* had paid on the note and mortgage the following amounts at the following dates: May 16, 1875, \$200; March 16, 1876, \$100; April 25, 1876, \$100; April 26, 1877, \$50; May 1, 1878, \$350; January 3, 1879, \$10; and January 17, 1879, \$433.53, being the amount of his charges for his services as an attorney, rendered at the request of Roberts; and, as a conclusion of law, it held that the plaintiff was entitled to a judgment of foreclosure and sale for the balance found due on the note and mortgage, viz., for \$716.78, with interest thereon at ten per cent. from November 9, 1880, and also for costs of the suit, including \$30 as solicitor's fee. From a judgment entered accordingly, the plaintiff appealed.

For the appellant there was a brief by *Myron Reed*, her attorney, and a separate brief by *Gregory & Gregory*, of counsel, and oral argument by *Mr. Reed* and *C. N. Gregory*. They contended, among other things, that Roberts had no

Miles vs. Ogden and another, imp.

right to receive, in payment of the note and mortgage belonging to *Mrs. Miles*, anything but money or what passes for money. Story on Agency, §§ 98, 99, and note 4, and cases cited; *Sweeting v. Pearce*, 7 C. B. (N. S.), 449-485; *S. C.*, 9 id., 534; *Ward v. Evans*, 2 Ld. Ray., 930; Salkeld, 542; *Rodgers v. Bass*, 46 Tex., 505; *Drain v. Doggett*, 41 Iowa, 682; *Mumford v. Armstrong*, 4 Cow., 553. If anything else than money is received by the agent, the principal is merely required to inform the debtor within a reasonable period after the transaction is brought to his knowledge, that he refuses to sanction it. *Ward v. Smith*, 7 Wall., 447. Charges for legal services performed at the request of Mr. Roberts, even for the plaintiff herself, were not in any legal sense a discharge of the money obligation to her, though they might constitute an offset to her demand. 39 Wis., 300.

For the respondent there was a brief by *C. S. Ogden*, in person, and oral argument by *Mr. Ogden* and *B. W. Jones*.

CASSIDAY, J. One ground urged for reversal is, that no part of the \$1,200 should have been applied as payment upon the note and mortgage, but should have been applied by the court as R. N. Roberts had credited it; that is, \$200 on the bond given by Walsh & Ogden, and \$1,000 to the credit of *Ogden's* individual account at the store, notwithstanding he was only indebted thereon at the time in the sum of \$357.37. But the court found as a matter of fact that *Ogden* paid the whole \$1,200 to be applied upon his individual indebtedness, and to that finding there is no exception, further than as to the time when the payment was made. We are not, however, disposed to sustain the exception, and hence that finding must stand as though no exception had been taken to it. This being so, R. N. Roberts was obliged to apply the whole payment upon *Ogden's* individual indebtedness then existing. As there was no specific direction to apply it all upon the note and mortgage, he had the legal right to apply enough of it to *Ogden's*

Miles vs. Ogden and another, imp. -

individual store account to cancel the same; but the balance he was obliged to apply *then* upon the only other existing indebtedness which he then held against *Ogden* personally, to wit, the note and mortgage in question.

We are not aware of any principle of law which would authorize R. N. Roberts, after receiving the \$1,200 with such directions, to apply any portion of it on the bond given by Walsh & Ogden, or to withhold any portion of it to be applied upon a debt thereafter to be contracted — an account thereafter to be traded out at the store. With such directions, he was bound to apply it to a debt or debts existing at the time the payment was made, and had no authority to hold it as security for a debt thereafter to be incurred. The authority of R. N. Roberts to bind the plaintiff, by accepting the \$1,000 mortgage in lieu of cash, is not questioned. In fact, the finding is that *Ogden* paid him \$1,200, without specifying that \$1,000 of it was by way of mortgage; and no exception having been taken to the finding in this regard, it must stand as a verity. The exceptions raise the question of the authority of R. N. Roberts to bind the plaintiff by receiving a deed of certain lands running to her, and allowing therefor \$350 as a payment on the note and mortgage. But if the plaintiff desired to repudiate the agency of her brother in that regard, she should have reconveyed the property as soon as it came to her knowledge. Certainly she cannot retain the title so conveyed to her, and at the same time repudiate the agency by which she acquired it. *Ballston Spa Bank v. Marine Bank*, 16 Wis., 120; *Paine v. Wilcox*, 16 Wis., 202; *Wellauer v. Fellows*, 48 Wis., 105; *Elwell v. Chamberlain*, 31 N. Y., 619.

The answer alleges certain payments, but nothing is set up by way of counterclaim or set-off. The court allowed as payment on the note and mortgage, under date of January 17, 1879, \$433.43, for certain services rendered by *Ogden* as attorney under an agreement with R. N. Roberts. The plaintiff denies the authority of R. N. Roberts to cancel any portion of

Miles vs. Ogden and another, imp.

her note and mortgage by way of paying for services rendered to her brother, or for her father's estate; and a reversal is urged because such allowance was made. Notwithstanding the entire business seems to have been under the control and management of R. N. Roberts, yet we are inclined to think that plaintiff cannot be bound by such deduction or application without her assent, expressed or implied, and we fail to find anything in the record indicating that she gave such assent. This abundantly appears from the authorities cited by counsel for the appellant. In so far, however, as *Ogden* rendered services as attorney in suits or business of the plaintiff personally, she would probably be bound to pay him, notwithstanding the business was transacted at the instance of her brother as her agent. But even services so rendered for the plaintiff cannot be treated as payments without an express agreement to that effect, made by the plaintiff or with, her authority. With this view of the case, we think the plaintiff is entitled to recover \$980.66, with interest thereon at ten per cent. from May 1, 1878, but without prejudice to any claim the defendant may have for services and disbursements as attorney for the plaintiff.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to enter judgment of foreclosure and sale in favor of the plaintiff in accordance with this opinion.

VOL. LIV—37

Clarke vs. Lincoln County.

CLARKE VS. LINCOLN COUNTY.

March 15 — April 5, 1882.

Limitation of Actions: Pleading. (1) Action to cancel tax certificate: how limited. (2) Reference to statute in demurrer. (3) Presumption from complaint as to time of commencing action.

1. Sec. 7, ch. 334 of 1878, which limited the time for bringing an action to cancel tax certificates *theretofore issued* to nine months from the time when that act took effect, continued applicable to those cases after the enactment of the present revision, though omitted therefrom. [See secs. 4221 and 4976, R. S.]
2. A demurrer and an answer to a complaint in such an action on the ground "that the action was not commenced within the time limited by law by sec. 7 of chap. 334 of the laws of Wisconsin for 1878," held to contain a sufficient reference to the statute, under sec. 2651, R. S.
3. Where the original complaint in an action sets forth a fact as having occurred on a specified day, the presumption is that the action was not commenced before that day.

APPEAL from the Circuit Court for *Lincoln* County.

Action to remove a cloud from plaintiff's title to certain lands, by cancelling tax certificates issued upon sales of said lands in 1875 and 1876, for the taxes of 1874 and 1875, upon the ground that the assessments of property for taxation for the years last named, in the towns in which plaintiff's lands were situate, were void. The defendant county demurred to the complaint on the ground that it appeared upon the face thereof that the action was not commenced within the time limited by sec. 7, ch. 334, Laws of 1878. The demurrer was argued before the judge of said circuit court at chambers, and was by him stricken out, apparently on the ground that ch. 334 of 1878 was not in force, and that the demurrer did not refer to any statute limiting the action. The defendant then answered. Upon the trial the court found that the assessments of property for taxation for the years 1874 and 1875, in the several towns in which the lands in question are situate, were void for an intentional non-compliance with the law on

Clarke vs. Lincoln County.

the part of the assessors; and it rendered judgment cancelling the tax certificates in question. The defendant appealed from the judgment.

For the appellant there was a brief by *W. H. Canon*, its attorney, with *Bump & Hetzel* and *P. L. Spooner*, of counsel, and oral argument by *Mr. Hetzel* and *Mr. Spooner*.

For the respondent there was a brief by *Eldred & Grace*, and oral argument by *Charles Barber*.

COLE, C. J. So far as this case is concerned it makes but little difference whether we consider it on the demurrer, or on the answer and the finding of the court. The result will be the same in either view. The action is to cancel tax certificates issued on the sale of plaintiff's lands for taxes, May 11, 1875, and May 9, 1876. In both the demurrer and answer the objection is taken and relied upon, that the action was not commenced within the time limited by section 7, ch. 334, Laws of 1878, and is therefore barred. Under that statute, the time for bringing the action would expire on the 25th of December, 1878, or after the lapse of nine months from the day this statute took effect. There can be no doubt but that this enactment continued in force or was applicable to the case. Indeed, it has in effect been so decided in *Mead v. Nelson*, 52 Wis., 402; *Smith v. Janesville*, id., 680; *Dalrymple v. City of Milwaukee*, 53 id., 178; *Manseau v. Edwards*, id., 457; *Smith v. Sherry*, 50 id., 210. We have said that both the demurrer and answer refer to section 7, chapter 334, as barring the action; and this was undoubtedly a sufficient reference to the statute relied upon as limiting the right to sue.

On the demurrer it is suggested, *non constat* but the action was commenced in time. But the complaint states that by a resolution of the county board, passed March, 1879, the board refused to instruct the county clerk to issue deeds upon these tax certificates. And the counsel for the defendant insists that the only fair inference which can be drawn from this allegation

Clarke vs. Lincoln County.

in the complaint is, that the action was certainly not commenced until after the passage of this resolution. It is undoubtedly correct to say that when in a pleading any fact is set forth as having occurred at a specified time, the presumption is that the action was not commenced until after that time. Therefore, we are inclined to hold that it did sufficiently appear upon the face of the complaint that the action was barred, so that the objection could be taken on demurrer. But, however that may be, it was stipulated that the action was in fact commenced by service of summons on the county clerk on the 11th of March, 1879, and that this stipulation should become a part of the record proper, and be considered by this court.

The learned counsel who argued the case for the plaintiff in this court was candid enough to admit that the judgment was indefensible and must be reversed. There can be no doubt that this admission was not improvidently made, in view of the acts of the legislature and the decisions of this court upon them. The learned circuit court erred in cancelling the tax certificates and granting the plaintiff the relief asked.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to dismiss the complaint.

CLARKE VS. LINCOLN COUNTY.

March 15 — April 5, 1882.

LIMITATION OF ACTION to cancel Tax Certificate. (1) *Act of 1878 valid.*
(2) *When stay of proceedings, for reassessment, imperative.*

1. Sec. 7, ch. 334, Laws of 1878, which limited the right of action to set aside tax sales, or cancel tax certificates, to a period of nine months from the date of the sale or certificate, etc., was valid.
2. In an action to cancel tax certificates on sales made in 1879, the court found that the tax whose validity is questioned was based upon an assessment of the lands of the town not made by the assessor from actual

Clarke vs. Lincoln County.

view or the best practical information that could be obtained as to their actual value, nor at the fair cash value of the lands, or the price at which the owners would have been willing to sell them had they been desirous of so doing, and that the assessor intentionally and fraudulently assessed said lands in some cases at one-half, in others at one-third, in others at one-fourth their cash value, proceeding by an arbitrary rule regardless of the value. *Held*, that it was thereupon the duty of the court, under sec. 1210b, R. S., to stay all proceedings in the action until a proper reassessment of the property of the town could be made; and it was error to render judgment cancelling the certificates without waiting for such reassessment.

APPEAL from the Circuit Court for *Lincoln County*

Action, commenced November 13, 1879, to remove a cloud from plaintiff's title to certain lands, by cancelling tax certificates issued upon sales of said lands in 1877, 1878 and 1879, each of said sales being for the non-payment of taxes of the preceding year; the ground alleged for such relief being that the assessments of property for taxation for the years 1876, 1877 and 1878, in the several towns in which said lands were situate, were void. The answer alleged, among other things, that the action was not commenced within the time limited by ch. 334, Laws of 1878. The court found as facts, among other things, that the assessments of both real and personal property for taxation, in the towns and for the years in question, were not made by the assessors from actual view, or the best practical information that could be obtained as to the value of such property; that said assessors did not assess the real property liable to taxation in said towns for said years at the fair cash value of the same, or at the price at which the owners would have been willing to sell, had they been desirous of so doing; but that they knowingly, intentionally and fraudulently assessed said real estate, in some cases at one-half, in some cases at one-third, and in others at one-fourth the fair cash value; and that they assessed the same at an arbitrary uniform price per acre, regardless of its value. Thereupon the court rendered judgment cancelling the certificates in question; and defendant appealed from the judgment.

Clarke vs. Lincoln County.

For the appellant there was a brief by *W. H. Canon*, its attorney, with *Bump & Hetzel* and *P. L. Spooner*, of counsel, and oral argument by *Mr. Hetzel* and *Mr. Spooner*.

For the respondent there was a brief by *Eldred & Grace*, and oral argument by *Charles Barber*.

COLE, C. J. As to the tax certificates which were issued on the tax sales made in May, 1877, and in May, 1878, the statute of limitations, which was set up in the answer, was a complete defense, and should have prevailed. This point is expressly so ruled in the case between these parties, the decision of which is announced at the same time as this case. That it is entirely competent for the legislature to limit the right of action to set aside tax sales or tax certificates by the owner, has been repeatedly affirmed in this court, and the question is not open for debate. Therefore section 7, ch. 334, Laws of 1878, must be deemed a valid enactment; and it bars this action as to the tax certificates issued on the sales made for those years.

The judgment is clearly erroneous, also, as to the tax certificates issued on the sale made in May, 1879. The objection to the tax of 1878 doubtless went to the very groundwork of the tax, and brought the case within section 1210*b*, R. S. The statute plainly directs what shall be done in such a case. *Plumer v. Board of Supervisors*, 46 Wis., 163; *Flanders v. Town of Merrimack*, 48 Wis., 567; *Single v. Town of Stettin*, 49 Wis., 645; *Kingsley v. Supervisors*, *id.*, 649; and *Monroe v. Ft. Howard*, 50 Wis., 228. The statute is clear and mandatory in its terms, requiring the court to stay all proceedings in the action until a proper reassessment of the property of the town can be made. This course should have been pursued as to the tax of 1878.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for further proceedings according to law.

Hewett vs. Allen, Defendant, and Campbell, Garnishee.

HEWETT vs. ALLEN, Defendant, and CAMPBELL, Garnishee.

March 15 — April 5, 1882.

HOMESTEAD: *To whom exemption of proceeds applies.*

The statute (R. S., sec. 2983) which provides that the exemption of a debtor's homestead shall not be impaired by a sale thereof, but "shall extend to proceeds derived from such sale while held with the intention to procure another homestead therewith, for a period not exceeding two years," does not require, as a condition of such exemption, that the debtor shall continue to reside in this state during the two years, nor that he shall intend to procure another homestead in this state.

CASSODAY, J., dissents.

APPEAL from the Circuit Court for Wood County.

The plaintiff, having recovered judgment against the defendant *Allen*, and having issued execution thereon, proceeded by garnishment against *Campbell* in aid of his execution to reach a certain promissory note in his hands belonging to *Allen*. Both the defendant and the garnishee answered that the note was exempt from seizure on execution. Issue was taken on these answers. The issue was tried, and the circuit judge found as facts that the note was given as part of the price of *Allen's* homestead in Clark county, theretofore sold and conveyed by him to the maker of the note, and that he has always intended to procure another homestead with it; that two years had not elapsed since such sale and the making of the note; that *Allen* is the owner of the note; that shortly after such sale *Allen* removed to Minnesota, and resided there with his family when the garnishee action was commenced; and that he has not secured another homestead, nor fully decided where he will permanently reside. On these findings judgment in the garnishee action was ordered and entered against the plaintiff in due form. The plaintiff appealed from such judgment.

The cause was submitted for the appellant on the brief of *R. J. MacBride*.

Hewett vs. Allen, Defendant, and Campbell, Garnishee.

For the respondents there was a brief by *Morrow & Masters*, and oral argument by *Mr. Morrow*.

LYON, J. The statute provides that the exemption of a homestead shall not be impaired by a sale thereof, but such exemption "shall extend to the proceeds derived from such sale, while held with the intention to procure another homestead therewith, for a period not exceeding two years." R. S. p. 783, sec. 2983.

The note being proceeds derived from the sale of the judgment debtor's homestead less than two years before the garnishee action was brought, and the same being held by him with the intention to procure another homestead therewith, the only question in the case is, Was his right to hold the same exempt from seizure defeated by the removal of the judgment debtor from the state? We think this question must be answered in the negative. The statute contains no such restriction. It exempts the proceeds of the sale of a homestead for two years, with the single condition that the same be held with the intention to procure another homestead therewith. This condition is complied with in the present case. It does not impose as a condition of the exemption that the grantor of the homestead shall continue to reside in this state, or that his intention must be to procure another homestead in this state. To hold that either of those conditions is implied in the statute would not only violate the liberal rule of construction of exemption laws in favor of the debtor which has always obtained in this state, but would be an interpolation of conditions and restrictions in the statute, which the legislature has not expressed, and, as we think, did not intend.

An argument against the view we have taken of the statute was presented by the learned counsel for the plaintiff, based upon the language of the same section (2983) which exempts a homestead "owned and occupied by any resident of this state." But we regard this provision merely as a restriction

Hewett vs. Allen, Defendant, and Campbell, Garnishee.

upon the right to acquire a homestead, limiting the right to a resident of this state, and not as a limitation upon the exemption of the proceeds of the sale of a homestead when one has been acquired and afterwards sold. As before observed, any other construction would do violence to the language of the statute.

The rule of construction here adopted was sanctioned and applied by this court in *Lowe v. Stringham*, 14 Wis., 222.

The judgment must be affirmed.

CASSIDAY, J. I cheerfully concur in the liberal rule of construction so often given by this court to the laws of this state exempting property of those within its jurisdiction; but it does not follow that the same liberality should extend those laws so as to exempt the property of persons who are not in this state, but are citizens and residents of other states. It would seem that exemption laws, as well as all other laws of a state granting special benefits, are presumptively for those within the state, and not those who are citizens and permanent residents of other states.

In *Cope v. Doherty*, 4 Kay & Johns., 367, it was held that "*prima facie*, and unless the contrary be expressed, or be implied from the absolute necessity of the case, every legislature must be presumed to have intended by its enactments to regulate the rights which should subsist between its own subjects and not to affect the rights of foreigners, whether by way of restricting or augmenting their natural rights." To the same effect is *The Zollverein*, 1 Swab. Adm., 96; *Jefferys v. Boosey*, 4 H. L. Cas., 815. "It is conceded," said MARSHALL, C. J., "that the legislation of every country is territorial; that beyond its own territory it can only affect its own subjects as citizens." *Rose v. Himself*, 4 Cranch, 279. Mr. Story states the same rule thus: "It is plain that the laws of one country can have no intrinsic force, *proprio vigore*, except within the territorial limits and jurisdiction of that country. They can

Hewett vs. Allen, Defendant, and Campbell, Garnishee.

bind only its own subjects, and others who are within its jurisdictional limits, and the latter only while they remain therein." Story's Conf. Laws, § 7. See also sections 20, 98, 278.

In *Finley v. Sly*, 44 Ind., 267, it was held that, "when an execution defendant ceases to be a resident householder of this state, his right to exempt any of his property from execution ceases, and property that may have been set off to him as exempt while such resident householder, may be seized and sold on execution." See *Norton v. Lum*, 18 La. Ann., 39; *Trawick v. Harris*, 8 Tex., 317.

Assuming that our exemption laws were enacted with reference to our own citizens and those within our own jurisdiction, and not those who are citizens and residents of other states, it would seem that the defendant *Allen*, being a resident and citizen of Minnesota, is not entitled to the note in question as exempt under our statute, unless the legislature have expressly or by necessary implication manifested an intent to exempt such property to citizens and residents of other states. Under our statute, a "homestead" is exempt by reason of its being "owned and occupied by" one who is a "*resident of this state.*" Section 2983, R. S. True, the same section interposes an exception to the extent that "*such exemption shall not be impaired by temporary removal with the intention to reoccupy the same as a homestead, nor by a sale thereof, but shall extend to the proceeds derived from such sale, while held with the intention to procure another homestead therewith, for a period not exceeding two years.*" Certainly a removal from the state, not only with the intention of becoming a resident and citizen of another state, but actually becoming such resident and citizen, is entirely inconsistent with "temporary removal with the intention to reoccupy the same as a homestead." Besides, the express language of the statute is, "*such exemption shall not be impaired,*" "but shall extend to the proceeds," etc. But "*such exemption,*"

Hewett vs. Allen, Defendant, and Campbell, Garnishee.

which is thus prevented from being "impaired," and thus *extended*, is confined by the express language of the section to a "resident of this state," and has no application, and, by the rule of construction above given, can have no application, to residents and citizens of other states. It is only "such exemption" as is thus given to a "resident of this state," which is extended to the proceeds derived from the sale of the homestead for the period of two years, provided they are held for that length of time, "with the intention of procuring another homestead therewith." The sole purpose of this exemption is to secure homesteads in this state, and not to secure homesteads in other states, to persons who are citizens and residents of such states. *Allen*, having become a resident and citizen of Minnesota, became entitled to the benefits of the exemption laws of that state. As such resident of Minnesota he could hold as exempt a homestead of not exceeding eighty acres of land in the country, or a lot in a city or village, and the dwelling-house thereon and its appurtenances. Section 1, ch. 68, R. S. of Minn. He could also hold as exempt, under the statute of that state, a very liberal supply of personal property. Sec. 310, ch. 66, *id.* It is true, the court found that he had not in fact secured another homestead, nor fully decided where he would permanently reside; but, as he had voted in that state, it would seem that he should be regarded as a citizen and necessarily a resident of that state. To test the question, suppose he had sold a considerable amount of land and other property in Wisconsin which was not exempt, and with the proceeds purchased eighty acres of land and other property in Minnesota, which he occupied and held as exempt under the laws of that state: would it still be held that he might, in addition, hold the proceeds of his Wisconsin homestead exempt for the period of two years, and until he should fully decide where he would permanently reside? If not, then why not, if the decision of this case is correct? Is the question of the exemption of the note here involved de-

Hewett vs. Allen, Defendant, and Campbell, Garnishee.

pendent upon the investment or non-investment of the avails of other property, instead of the fact as to whether the debtor had or had not actually changed his residence and citizenship? If it is, then it would seem to be entirely immaterial whether the debtor ever had been a resident of this state or not. If, however, it is dependent upon the fact of residence and citizenship at the time the suit was commenced, then, as the debtor was, upon the admitted facts, entitled to the benefit of the exemption laws of Minnesota, it follows that he could not at the same time be entitled to the benefit of the exemption laws of Wisconsin, unless it be held that a person with a fixed residence and citizenship is not only entitled to benefits of the exemption laws of the state in which he resides, but also of the state in which he has ceased to reside. It would seem that a construction should not be indulged which would give to a migrating individual the benefit of the exemption laws of two different states *at the same time*, while permanent residents could only have the benefit of one. The fact of the debtor not being a resident of this state (subd. 5, sec. 2731, R. S.) of itself entitled the plaintiff to an attachment against his property here; and yet it could be of no avail in this case, if a non-resident debtor may invoke the benefit of our exemption laws for two years after he has ceased to be a resident of this state and become a citizen of another state.

In *Yelverton v. Burton*, 26 Pa. St., 354, WOODWARD, J., giving the opinion of the court, said: "But debtors subject to foreign attachment are no more within the spirit of the exemption law . . . than they are within its letter. We do not legislate for men *beyond our jurisdiction*, and certainly not for absconding debtors; but the act . . . was designed for *our own citizens* — for the families of the poor who are *with us*, — that the rapacity of creditors might not strip them of every comfort and convenience. The primary object of the process of foreign attachment is to compel the appearance of the debtor; and if it fail of this purpose — if he will not come within our

Hewett vs. Allen, Defendant, and Campbell, Garnishee.

jurisdiction to answer to his liabilities,—let him not come to appropriate our bounties.” This language is quoted with approval in *Orr v. Box*, 22 Minn., 485, where it was held that “an absconding debtor who has departed the state without any intention of returning, and becomes a resident of another jurisdiction, cannot avail himself of the benefits of our exemption laws in respect to personal property left behind him, and subsequently seized and sold upon execution.”

I am not aware of any case where this court has heretofore held that a resident and citizen of another state is entitled to the benefit of the exemption laws of this state.

In *Lowe v. Stringham*, 14 Wis., 222, the claimant of the wheat was a “temporary resident,” and it was held that the statute makes no discrimination “between temporary and permanent residents.” What was said in that case by Mr. Justice PAINE about “the temporary *sojourner*, or even the stranger within our gates,” was clearly *obiter*; but even that, as I think, does not authorize the inference of a willingness on his part to give residents and citizens of other states the benefit of the exemption laws of this state. But, however that may be, one of the first acts passed at the next session of the legislature after that decision, was chapter 11, Laws of 1862, limiting the exemption of the class of personal property referred to in *Lowe v. Stringham*, and all other personal property (except such as pertained to the household, wearing apparel, a place of worship, and burial of the dead), “to debtors having an actual residence in this state.” That limitation has not only been preserved, but extended from four subdivisions of the section to ten subdivisions. See last part of section 2982, R. S., p. 783. Prior to the act of 1862, as intimated by Mr. Justice PAINE, the statute exempting personal property was silent as to residence, but the implication arising from the rules of construction indicated by the above authorities made it applicable only to those who were within the jurisdiction of the state. Of course, when the legislature expressly limited cer-

Hewett vs. Allen, Defendant, and Campbell, Garnishee.

tain classes of personal property to actual residents of the state, it thereby raised a counter implication that the other classes of personal property not so limited were exempt, without reference to the question of residence. But in the statute exempting homesteads it was never left to implication; for there it has always been expressly confined to lands owned and occupied by a "*resident of the state*," and it was only "such exemption" that was "extended" to the "proceeds" derived from the sale of the homestead. While the statute protects a "resident of the state" in the ownership of such proceeds "for a period of not exceeding two years," yet, in my judgment, it does not continue such protection after such owner has ceased to be such a resident of this state, and actually becomes a resident and citizen of another state; and to give to the statute that effect by construction, is to interpolate into it words of such import. The inequality of exempting large sums of money, even to residents of the state, for a period of two years, merely because they were once so fortunate as to own a homestead, and yet affording no protection of an equal amount to those who are desirous of buying one, is apparent; but to extend such protection to residents and citizens of other states seems to be unjust, not only to resident creditors, but to that large class of citizens who, from the rapacity of creditors or otherwise, have never been able to accumulate and hold as exempt a sufficient amount of money with which to buy a homestead in the first instance.

For the reasons given, I prefer to have my associates take the responsibility of the decision of the court in this case.

By the Court.—Judgment affirmed.

Wylie vs. Karner.

WYLIE VS. KARNER.

March 15 — April 5, 1882.

FORECLOSURE OF MORTGAGE: ISSUES AND FINDINGS: PLEADING: COUNTERCLAIM: ATTORNEY'S FEES. (1) *Whether finding disposes of issue as to payments.* (2) *Mortgage construed.* (3) *Answer: Counterclaim, how pleaded.* *Whether issue upon counterclaim disposed of.* (4) *Finding construed.* (5) *What attorney's fees allowed.*

REVERSAL OF JUDGMENT: (4) *Only for error injurious to appellant.*

1. By the terms of a mortgage given to secure payment of purchase money amounting in all to \$2,950, \$100 were to be paid at once; the mortgagor was to pay all incumbrances then existing upon the property, and be credited with one-half the amount; and the remainder was to be paid in installments. In an action brought some years afterwards, the complaint alleged that there was due and unpaid on the mortgage a balance of \$2,000, and the answer, without expressly denying this averment, alleged that defendant had paid, before the commencement of the action, incumbrances amounting to about \$4,000, one-half of which should be allowed as a payment on the mortgage. There was no pretense of any other payments, except the \$100. The court found as a fact that there was due on the mortgage \$2,128. *Held*, that this sufficiently disposed of the issue as to the amount of payments made by defendant to discharge incumbrances.
2. Under the terms of the mortgage as above stated, the mortgagor was entitled to credits for one-half of the sums paid by him upon the amount of incumbrances existing *at the time of the sale*, but not for any part of sums paid by him for subsequently accrued interest on such incumbrances.
3. The answer also alleged damage to defendant from false representations by the vendor at the time of the sale; but did not allege that the vendor *knew* the representations to be false, nor did it plead the facts as a counterclaim. The court found that the vendor *warranted* the property free from defects, and that there was a defect, to defendant's damage in a certain amount, which was deducted in the judgment. *Held*, on defendant's appeal, that there was no error as against him; that, even if that part of the answer which relates to the alleged false representations could properly be treated as in form a counterclaim, it does not state a cause of action; and that, if it were otherwise, the issue was sufficiently disposed of by the finding and judgment.

Wylie vs. Karner.

4. The answer alleged that the property mortgaged was personal and not real property, and also set up certain alleged facts as estopping plaintiff from claiming that the mortgage was of realty. The mortgage was of an undivided half of a certain steam saw-mill, situate on a certain lot, and of the tools, implements and fixtures connected with such mill; and the court found that the mill still remained on said lot, and was "a stationary mill, set in brick arches on said land;" and it rendered judgment of foreclosure and sale in the manner prescribed for real-estate mortgages. *Held*, that at least some part of the property was virtually found to be real estate; and that, even if it were all personal property, there would be no error in the judgment injurious to the mortgagor.
5. Judgment in foreclosure can allow no sum as attorney's fees in addition to statutory costs, unless such sum is stipulated for in the mortgage.

APPEAL from the Circuit Court for *Portage* County.

The defendant appealed from a judgment in favor of the plaintiff. The case is thus stated by Mr. Justice TAYLOR:

"This action was brought to foreclose a mortgage. The complaint was in the usual form, and, among other things, alleged that the mortgagor, *S. H. Karner*, in and by said mortgage covenanted and agreed that he would pay the sum of \$25 solicitor's fees in case of the foreclosure of said mortgage by reason of the non-performance of any of the conditions thereof on his part. It seems that the mortgage was given to secure the purchase price of the property mortgaged. The mortgagee, Stevens, the plaintiff's assignor, sold the mortgaged property to the mortgagor, *S. H. Karner*, for the sum of \$2,950, of which \$100 was to be paid at the time of the sale, and one-half of the incumbrances existing on said property at the time of the sale was to be deducted from said purchase price, and the balance of the \$2,950 to be paid in three years from the 20th day of January, 1874, with interest at ten per cent. per annum. The complaint alleges that after paying \$100 on the day of sale, and one-half of the incumbrances on the property described in said mortgage, there was due and unpaid on said sale and mortgage the sum of \$2,000.

"The answer of *Karner* alleges, first, that he had before the commencement of this action paid incumbrances on said

Wylie vs. Karner.

premises amounting to about the sum of \$4,000, one-half of which should be indorsed on said agreement and allowed as so much payment on the mortgage; but he does not state the exact amount so paid by him, nor does he deny in express terms that the sum of \$2,000 was still unpaid on said mortgage, as alleged in the complaint. As a separate answer and defense *Karner* alleged matters which were in substance a counterclaim for damages on account of false representations made by the mortgagee upon the sale made by him to *Karner*. He also filed an amended answer alleging that the property mortgaged was personal property and not real estate, and setting out certain matters which he claims should estop the plaintiff from claiming that his mortgage was a mortgage upon real estate. The property is described in the mortgage as follows: 'The undivided one-half of a certain steam saw-mill, situate on lot four, section twenty-five, in township twenty-four, in range seven, in said county, and known as Stevens' Mill, and the undivided one-half of all tools, implements and fixtures of any kind connected with said mill; to have and to hold the above mortgaged premises, with the appurtenances, unto the said Alonzo Stevens,' etc. The mortgage was duly attested by two witnesses, acknowledged, and recorded in the office of the register of deeds of the proper county. No bill of exceptions was settled in the action, and the case comes to this court upon the record alone. The findings of fact appearing in the record are as follows: '1. That the mortgage set forth in the complaint was given to secure the purchase money for an undivided half of the steam fixtures, implements and personal property described in said complaint. 2. That at the time said mortgage was executed, said steam-mill was situated upon said lot four, in section twenty-five, township twenty-four N., of range seven E., in said county, and still remains on said lot. 3. That said steam saw-mill was a stationary mill, set in brick arches, on said land. 4. That the plaintiff is the legal owner and holder of said mortgage,

Wylie vs. Karner.

and that there is now due thereon \$2,128.87. 5. That at the time the said mortgage was executed, and the said steam-mill sold to the defendant, said Alonzo Stevens warranted the mill to be sound and free from all defects; and that the same was not then and there sound and free of all defects, but the engine was defective by reason of a flaw or hole in the same, which said defect diminished the value thereof \$125.'

"The conclusions of law were, '1. That the defendant is now justly indebted to the plaintiff in the sum of \$1,934.59, and is entitled to a judgment of foreclosure therefor, besides the costs of this action. 2. That the plaintiff have the ordinary judgment for the sale of said mortgaged premises, to-wit, the undivided half part of a certain steam saw-mill, situate on lot four, section twenty-five, in township twenty-four N., of range seven E., in said county, and known as Stevens' Mill, and the undivided half of all tools, implements, and fixtures of every kind connected with said mill, and the appurtenances thereunto belonging.'

"Judgment was entered in accordance with these conclusions, except that the plaintiff took judgment for \$50 for an attorney's fee, in addition to the taxable costs.

"The defendant filed the following exceptions to the findings of the court: '(1) The said findings do not determine the defense interposed by the answer, that, by the contract between Alonzo Stevens and this defendant, and upon which this action is brought, this defendant was to pay one-half of the incumbrances on the property mortgaged, to wit, the saw-mill and fixtures, and have the amount thereof deducted from the sum mentioned in said agreement, to wit, the sum of \$2,950; nor does it determine the amount of such incumbrances. (2) Said findings do not determine what incumbrances, if any, were upon said property, nor whether the defendant in fact paid any such incumbrances, or any part thereof, and, if so, to what amount. (3) Said findings do not determine whether the said Alonzo Stevens made the fraudulent representations

Wylie vs. Karner.

set forth in said answer. (4) Said findings do not determine whether the defendant made repairs on the machinery other than the cylinder, nor to what amount, nor whether he was entitled to damages in consequence thereof, as claimed in said answer. (5) Said findings do not determine any of the questions raised and issues formed by the further and supplemental answer of the defendant.' "

The cause was submitted on the brief of *Raymond & Haseltine* for the appellant, and that of *G. W. Cate* for the respondent.

TAYLOR, J. Upon this appeal the appellant alleges that his exceptions to the findings were well taken, and he also assigns for error that the judgment was erroneous in that it awarded to the plaintiff \$50 as attorney's fees in addition to the taxable costs, when the mortgage contained a covenant for the payment of only \$25 for such fee.

It is a sufficient answer to the first two exceptions, that the court does find that a certain sum was due and unpaid upon the contract for the sale of the land at the date of the finding, viz., the sum stated in such findings. It is very clear from the pleadings that the court did deduct a large sum from the amount which the contract called for, on account of the incumbrances on the mortgaged premises. There is no allegation in the complaint, or in the answer, that the defendant ever paid anything on the contract except the sum of \$100, paid at the time of the making the same; and whatever was deducted from the sum of \$2,850, and interest for over five years at ten per cent., must have been deducted on account of the one-half of the incumbrances on the property at the time of the sale.

The amount due on the contract after deducting the \$100 paid, with interest at ten per cent., would be upwards of \$4,560. The amount for which judgment was directed to be entered was the sum of \$1,934.59, so that there must have

Wylie vs. Karner.

been deducted, on account of the incumbrances, \$2,625, less the \$125 deducted for the damage to the boiler, or the sum of \$2,500. The defendant does not claim in his answer that he made any payment on the contract except the \$100 and the payments he made by way of discharging the incumbrances on the property, to about the amount of \$2,000, which should be applied to the payment of the amount called for in the contract.

By the contract, half of the incumbrances on the place were to be deducted from the mortgage, and the balance was to be paid in three years from January 20, 1874, with interest at ten per cent. If half the incumbrances amounted to the sum of \$2,000 at the time the contract was made, there would still be due for the balance of principal and interest over \$1,360 when judgment was entered; but the answer does not allege that half the incumbrances amounted to the sum of \$2,000 at the time the contract was made, but that the defendant had paid about that sum on account of half of such incumbrances before the action was brought. If that allegation be true, it does not show that he is injured by the finding of the court. It is probable that a considerable amount of that sum was paid for interest which accrued after the contract was made, which would not be chargeable to plaintiff's assignor, Stevens. The general finding upon this subject was clearly sufficient. *Knox v. Johnston*, 26 Wis., 41-43; *Catlin v. Henton*, 9 Wis., 476; *Sanford v. McCreedy*, 28 Wis., 103; *Willer v. Bergenthal*, 50 Wis., 474-479. If the appellant supposed the court had made any mistake as to the amount for which he should be credited on account of the incumbrances, he should have asked the court to find specially upon that question; and if not satisfied with such special finding on that subject, he should have excepted, and preserved the evidence in a bill of exceptions, so as to show the error of the court, if there was any.

The third and fourth exceptions are not well taken, because the court has found in his favor upon the allegations of his

Wylie vs. Karner.

second answer, and assessed his damages at \$125. The court has in fact found that there was a warranty and a breach, and has assessed the damages. This disposes of the defense, substantially. The answer upon this question is defective in not being pleaded as a counterclaim. See subd. 3, sec. 2656, R. S. The allegations are not sufficient to sustain a claim for damages on the ground of fraudulent representations, if it had been pleaded as a counterclaim, because it does not allege that the plaintiff knew that the representations were false when he made them. The court has, however, treated the answer as a counterclaim, and as sufficient to sustain a claim for a breach of warranty that the machinery was in good condition and free from defects. It seems to us that the appellant has nothing to complain of in this respect.

The objection that the court has not disposed of the issue raised by the amended answer, cannot be sustained. The court has by fair inference found that at least some part of the mortgaged property was real estate, and directed judgment for sale as in case of a real estate mortgage; and there is nothing in the findings of fact which is inconsistent with that finding.

Even if the evidence had shown that Stevens, the assignor of the plaintiff and the defendants' vendor, was not the owner of lot 4, upon which the mill, etc., stood at the time of the sale, still if he were in possession there would arise a presumption that he had a right to have his mill on said land, as lessee or otherwise. Such right would pass by the sale to his vendee, and be covered by the mortgage back for the purchase money, and would constitute an interest in land so as to sustain the mortgage as a mortgage of an interest in real estate; and if the proofs showed that Stevens was in fact the owner of lot 4, or was in the possession, and there was no other evidence of ownership, then his vendee would, if he took possession under his contract, be presumed to take the fee to the undivided half of the lot. Taking the description in the mortgage standing alone, we think it shows that it covered an interest in real es-

Wylie vs. Karner.

tate. But if it were all personal property, it is difficult to see how the defendant is prejudiced by the judgment directing its sale as real estate. In fact, such direction is rather for his benefit, as it gives him a year and over to redeem, which he would not be entitled to had the plaintiff sold the property as personal property. The property being in the hands of the mortgagor, and of a peculiar nature, and the amount due on the mortgage depending upon the amount of incumbrances on the property mortgaged, it would perhaps be proper on the part of the mortgagor to come into a court of equity and ask to have the amount due on his mortgage determined before sale under it, treating it as a chattel mortgage merely. But upon this point we do not deem it necessary to pass finally.

We find nothing in the record previous to the entry of judgment which should reverse the judgment. The allowance of judgment for the sum of \$50 attorney's fees, in addition to taxable costs, was wholly unauthorized by the terms of the mortgage, or by any provision of law. The claim made by the learned attorney for the respondent, that the court may, in an action to foreclose a mortgage, allow a reasonable attorney's fee in addition to taxable costs, and in addition to the sum agreed to be paid in the mortgage as such fee, is not sustained by any authority in this court; and in the late case of *Patrick Carroll's Will*, 53 Wis., 228, it was expressly held that the statute regulating costs applied to all cases, both equitable and legal, and no costs could be recovered in any case except such as were designated by the statute. That case was not intended to and does not decide that a party to a foreclosure suit may not recover a reasonable sum as attorney's fees, in addition to the statutory costs, when the mortgagor has so covenanted in his mortgage; but it does cover all cases where no such covenant exists in the mortgage. The plaintiff may therefore recover the \$25 agreed to be paid by the terms of the mortgage in addition to the statutory and taxable costs, but there is no authority for his recovery beyond that amount. Under

 Kirby and others vs. Corning, Garnishee, and others.

the rule established by this court in *Page v. Town of Sumpter*, 53 Wis., 652, and the cases there cited, we must reverse the judgment because it includes the sum of \$25 for attorney's fees more than the law authorizes.

By the Court.—The judgment of the circuit court is reversed, with costs, and the cause remanded with directions to the circuit court to enter judgment in conformity to this opinion.

 KIRBY and others vs. CORNING, Garnishee, and others.

March 15 — April 5, 1882.

GARNISHMENT: WAIVER: COSTS. (1) *Waiver of formal objections to answer.* (4) *When claimant interpleading in garnishment entitled to costs.*

REVERSAL OF JUDGMENT: (2, 5) *For determinations not affecting injuriously appellant's rights.*

1. Where a person whom a garnishee's answer discloses as a claimant of the fund in dispute, has been ordered to interplead (R. S., sec. 2767), and has answered setting up his claim, and the plaintiffs have taken issue on the answer, and gone to trial thereon, they cannot afterwards object that the answer is unverified or out of time.
2. An error in rejecting testimony is cured where the testimony is afterwards admitted in full; and the erroneous rejection of evidence is no ground of reversal unless the appellant may have been prejudiced thereby.
3. One who has voluntarily consented to the use of money in the hands of another to pay the debts of a third person, may revoke such consent before the payment of the money.
4. It having been found that part of the fund in the garnishee's hands belonged to the principal debtor, and another part to the person required to interplead, judgment properly goes in favor of the latter against the plaintiff, for costs.
5. Where the court orders the garnishee to pay over to such party interpleading so much of the fund as is adjudged to belong to him, the question whether this is a proper order will not be considered on the plaintiff's appeal.

Kirby and others vs. Corning, Garnishee, and others.

APPEAL from the Circuit Court for *Taylor* County.

The action was commenced by service of the summons and affidavit for garnishment upon the garnishee, the principal defendant, Alpheus Tucker, not being found. The garnishee answered, alleging that he had under his control the sum of \$300, belonging to said defendant, which he had received in settlement of certain actions upon policies of insurance in favor of such defendant and of Clara E. Tucker, his wife, and that of said amount Clara E. Tucker claimed the sum of \$220. It is stated in the printed case that Clara E. Tucker was interpleaded as a defendant in the action; that "judgment was duly rendered against the said garnishee, *S. A. Corning*, and the said Clara E. Tucker, interpleaded as aforesaid, on the 2nd day of July, 1879, which judgment was vacated and set aside by an order of said court on the 3d day of September, 1879;" and that Clara E. Tucker served an unverified answer upon the plaintiffs with notice of the motion to vacate the judgment above mentioned, but never served any other answer. The answer of Clara E. Tucker, which is annexed, as an exhibit, to the bill of exceptions, alleges, in substance, that the money in the hands of the garnishee is her separate property, in no way liable for the debts of Alpheus Tucker. It is further stated in the printed case, that "the plaintiffs duly filed and served their notice in writing that they elected to take issue on the answer in said action;" and that "the said action came on for trial upon the complaint and answer of the garnishee, and judgment was rendered on the 17th day of September, 1880, in favor of the said Clara E. Tucker, impleaded, and against the plaintiffs, and for the sum of \$29, costs of action, from which said judgment, this appeal is taken." The judgment recites that "the trial of this issue in the above action, made by the complaint of the plaintiff and the answer of the said defendant, Clara E. Tucker, came on to be tried and was tried by a jury," etc. It further recites the verdict of the jury that the garnishee has in his hands \$70 belonging to Alpheus Tucker, and \$220 belonging

Kirby and others vs. Corning, Garnishee, and others.

to Clara E. Tucker, and adjudges that the garnishee pay said sum of \$220 to Clara E. Tucker, and that she recover costs taxed at \$29, from the plaintiffs. The plaintiffs appealed.

The view taken by this court of the evidence, and of the charge of the court below, will appear from the opinion.

John K. Parish, for the appellants.

G. W. Cate, for the respondents.

ORTON, J. The garnishee having disclosed that *Clara E. Tucker* claimed a part of the moneys in his hands sought to be reached by the plaintiffs in their proceeding of garnishment, and she having been ordered to interplead according to the provisions of section 2767, R. S., and having answered, claiming that the sum of \$220 of such moneys belonged to her in her own right, and the plaintiffs having taken issue, and proceeded to trial before a jury on such issue, it was then too late to object to her answer that it was not verified or out of time. The questions put to the garnishee on the trial, relating to the settlement of the suits against the insurance company, and the settlement of the plaintiff's claim out of the insurance moneys, and the agreement of the parties in respect to the same, may have been proper, and the sustaining of the respondents' objection to the same may have been erroneous; yet such error, if any, was cured by the garnishee afterwards testifying fully as to all the matters embraced in such inquiry. He stated fully that he settled with the insurance company and obtained a certain amount on account of the policy to Alpheus Tucker, and the one to *Clara E. Tucker*, and that *Clara E.* consented to the use of her money in the hands of the garnishee in the payment of the plaintiffs' claim and other claims against her husband; and that, after the moneys were received by him, *Clara E. Tucker* countermanded and withdrew such consent.

It is objected that she could not countermand such authority, and that she should be estopped from so doing. But she unquestionably could so countermand the authority of her agent

Kirby and others vs. Corning, Garnishee, and others.

before the money was actually paid to the plaintiff; for her promise or agreement was merely voluntary and without consideration, and verbal.

It appeared in evidence that Alpheus Tucker, the husband, owned a stock of goods within a store building belonging to *Clara E.*, his wife, and that they sold both the goods and store to one Cone, and that she deeded to Cone the store building and lot on which it stood, and received in consideration therefor certain tracts of pine lands, which were deeded to her by Cone; and Cone testified fully about this transaction. The learned counsel of the appellants offered in evidence a certified copy of that deed from Cone to her, and the court sustained the objection of the respondents to such offer, and this is assigned as error. The deed, or a certified copy of it, was probably admissible and competent evidence, but it was certainly quite immaterial and unnecessary as bearing upon the claim that the property in the pine lands was nominally in *Clara E.*, the wife, but that they really belonged to Alpheus Tucker, the husband, and that the conveyance was to defraud his creditors. There was nothing in the peculiar form of the deed itself which could throw any light upon the question, and the fact that such a deed was actually made was fully in evidence, and all the facts and circumstances relating to it.

It appeared in evidence, as near as we can understand it (for the evidence was very meager and somewhat disconnected, and not so clear to us as it evidently is to the learned counsel on both sides, who knew many things which were not proved), that the store building insured was purchased by *Clara E. Tucker*, and the legal title was conveyed to her, and that she formerly owned a store and lot at another place, which she sold to Cone, and Cone deeded to her on the purchase of it certain pine lands of considerable value. She therefore had a separate estate before she bought the store on which she obtained the insurance money. It does not appear whether she used the proceeds of these pine lands as purchase money of the

Kirby and others vs. Corning, Garnishee, and others.

store, but it may well be presumed that she did, in the absence of all proof on the subject, when her title is questioned on this record on the ground that it is not shown that she purchased the store building and lot with her own means or separate property.

There was no motion for a new trial, and we shall therefore say nothing more on the merits of the case. The charge of the learned judge appears to have been clear and fair, and not liable to criticism. The jury found that the garnishee held in his hands \$70 belonging to the defendant Alphens Tucker, and \$220 belonging to *Clara E. Tucker*, and the court ordered the \$220 paid to *Clara E. Tucker*, and rendered judgment in her favor against the plaintiffs for costs. The practice in such a case is new and unsettled, and whether this order was proper, or whether judgment should have been rendered in favor of the claimant against the garnishee in such a case, or whether neither course should be pursued and the money left in the hands of the garnishee, we do not choose to decide on this appeal, because the question is not involved, as the plaintiffs are not interested in it, and it is immaterial to them how the claimant obtains the money after it has been duly found to belong to her, or whether she gets it at all. The judgment for costs was clearly proper. The finding appears to be ready for the plaintiffs to take judgment against the garnishee for \$70.

By the Court.—The judgment of the circuit court is affirmed.

Galloway vs. Week and another.

GALLOWAY VS. WEEK and another.

March 15—April 5, 1882.

SALE OF CHATTELS. (1, 2) *Contract for sale of lumber construed. When title passed.*REVERSAL OF JUDGMENT: (3) *For immaterial error.*

1. A contract declares that W. & C. have sold to the M. M. Co., 65 per cent. of the entire cut of lumber for the season, cut from logs already delivered or to be delivered at a certain mill; said lumber to be cut and piled as the M. M. Co. may direct, and to be loaded on cars when that company shall have cars on the side-track therefor; in consideration thereof, the M. M. Co. agrees to pay \$16 per M. feet for said 65 per cent. of the entire cut, as follows: Said lumber to be "estimated" on or near the 15th of each month, and \$12 per M. feet in yard of the 65 per cent. of cut to be paid to W. & C. at the time of the "estimate," and the remaining \$4 per M. feet to be paid when the lumber is loaded on cars for shipping; "title to said lumber to vest in the M. M. Co. as soon as estimated;" and none of the lumber to be shipped until estimated and paid for. *Held*, that no title to any part of the lumber passed to the M. M. Co. under the terms of the contract, until the whole amount cut and in the yard at a given time had been measured and determined by the parties, and the specific lumber sold to said company had been set apart and distinguished from the remainder; but when this was done, the title to such lumber would immediately pass, before any payment made.
2. Proof that several piles of the lumber in the yard had been estimated by the M. M. Co. in the presence or with the knowledge of W. & C. or their agent, and had been marked by the company with its initials and with figures showing the quantity in each pile; that these piles were subsequently sold by the company to the plaintiff; and that the company had made large advances on the contract — *held*, insufficient to show title in the plaintiff, in the absence of any evidence that W. & C. had assented to such marking of the piles, or such sale, or agreed that the title to such piles should pass to the company.
3. Where the plaintiff in an action for the conversion of chattels has shown no title to the property, a judgment against him will not be reversed for any error in the charge or rulings of the court.

APPEAL from the Circuit Court for *Marathon* County.

Action for the conversion of certain lumber. The answer, in substance, alleges that the lumber was manufactured by the

Galloway vs. Week and another.

defendants under a contract with the Mihills Manufacturing Company, but was never estimated, delivered or paid for according to the contract; and that, after due demand on the company to fulfill its contract, its failure to comply, and due notice to the plaintiff, who had acquired the rights of the company in relation to the lumber, the defendants sold the lumber to save themselves from loss. The view taken by the court of the evidence, and the charge of the circuit court, will appear from the opinion. There was a verdict for the defendants; a motion for a new trial was denied; and, from a judgment on the verdict, plaintiff appealed.

For the appellant there was a brief by *Shepard & Shepard*, her attorneys, with *C. W. Felker*, of counsel, and oral argument by *C. E. Shepard* and *Mr. Felker*.

For the respondents the cause was submitted on the brief of *G. W. Cate*.

COLE, C. J. It is not claimed that the plaintiff can maintain this suit unless she was the owner of the lumber which it is alleged was converted by the defendants. That is to say, it was essential for her to show that the title to the property had passed to her, otherwise she was not entitled to recover its value. She makes title through a sale from the Mihills Manufacturing Company. The question is, Did the title and ownership of the lumber ever become so vested in that company that it could pass the property by sale to the plaintiff? This, of course, is the vital question in the case, and its solution requires an examination of the contract. By the contract the defendants sold to the Mihills Manufacturing Company sixty-five per cent. of the entire cut (after taking out culls and shingles) of lumber, which should be manufactured for them from logs that season at the mill designated. The contract provided that the lumber should "be cut into shop cuttings," as directed by the Mihills Company, and should be piled for the purpose of being loaded on the cars as the com-

Galloway vs. Week and another.

pany should order. Then follows the clause upon which the case turns, and which reads as follows:

"In consideration whereof the parties of the second part promise and agree to pay sixteen dollars per thousand feet for said sixty-five per cent. of entire cut of lumber, as aforesaid, in manner as follows: Said lumber to be estimated on or near the 15th of each month, and twelve dollars per thousand feet in yard of the sixty-five per cent. of cut aforesaid to be paid to the parties of the first part at the time of estimate, or within ten days after said estimate, and the balance, four dollars per thousand feet, to be paid when lumber is loaded on cars for shipping; title to said lumber to vest in the parties of the second part as soon as estimated; said lumber to be shipped as soon as dry enough to put 10,000 feet on a car; and none of said lumber to be shipped until estimated and paid for."

The contention is as to the meaning of this clause, and what was necessary to be done under it in order to pass the title of the lumber. On the part of the defendants it is insisted that the clause meant and required a monthly estimate; in other words, an actual measurement or ascertainment by the parties of all the lumber in the yard which was cut under the contract, and a separation or designation of the sixty-five per cent., so as to identify the property the title to which would pass to the vendee. It seems to us that this is the true meaning and proper construction of the clause.

It is said by the learned counsel for the plaintiff, that the word "measure" is not used in the contract, but the word "estimate." But we think the latter expression, in the connection in which it is used, means essentially the same thing as the former. The word "estimate" here involves the idea that there is to be a measurement of the lumber each month, of the entire cut, and the setting apart of the proper quantity to the company as a condition to the passing of the title. We see no reason why the general rule applicable to the sale of

Galloway vs. Week and another.

personal property does not apply to the case. Ordinarily, where a party claims title to goods under a sale, and the question arises as to when the property passed, it is material for him to show that everything the seller had to do was already done, and that nothing remained to be done on his own part but to take away the specific goods. They must have been weighed or measured, and specifically designated and set apart by the vendor, subject to his control. 2 Greenl. Ev., § 638; Benj. on Sales, § 319, and authorities cited in note *c*. There is a very strong reason for holding that the parties to this contract intended that the monthly estimate should be a measurement of the entire cut in the yard; for sixty-five per cent. of the quantity was to become the property of the company when that estimate was made, and \$12 per thousand was to be then paid, or within ten days thereafter. It is obvious that in order to determine the quantity which the company was bound to receive and pay for under the contract, this measurement was necessary. Indeed, the title to no particular lumber would pass until that measurement was made, and the sixty-five per cent. of the quantity was set aside and allotted to the company. It was surely the right of the parties to participate in that measurement, and no *ex parte* estimate or measurement could be made which would bind the other party, unless waived.

Now, without discussing the facts, it is sufficient to say that there is not the least *scintilla* of evidence tending to show that a monthly estimate or measurement of the entire cut in the yard was ever made by any one. And the learned counsel for the plaintiff frankly admit that at no time was there an estimate of the total quantity of sawed lumber then in the yard ever made, and sixty-five per cent. taken out and set aside for the company. In our view, it was absolutely essential that this should be done before the title to any portion of the lumber would pass. The contract is clear and specific that the monthly estimate is to be of the entire cut in the yard.

Galloway vs. Week and another.

Measurement was necessary to ascertain the quantity; separation was essential to identify the property which the company was to receive and pay for. For it is a fundamental principle, pervading everywhere the doctrine of sales of chattels, that if goods be sold while mingled with others, by number, weight or measure, the sale is incomplete, and the title continues with the seller until the bargained property be separated and identified. 2 Kent's Comm., 496. The reason is that the sale cannot apply to any article until it is clearly designated, and its identity thus ascertained. *Crofoot v. Bennett*, 2 Coma., 258; *Gibbs v. Benjamin*, 45 Vt., 124; *Prescott v. Locke*, 51 N. H., 94; *Lingham v. Eggleston*, 27 Mich., 324. Until this monthly estimate was made and the company's sixty-five per cent. separated, the contract remained executory, and the title continued in the defendants. And it seems to us very clear that the making of this estimate as required by the contract was a condition precedent to the transfer of the property in any of the lumber.

But while the plaintiff's counsel do not claim that there is any evidence which tends to prove an estimate at any time of the entire cut in the yard, yet they do insist that there was testimony which would warrant the jury in finding that the agents of the company went to the yard where the lumber was being manufactured, at the time specified in the contract, for the purpose of making the estimate; that at each time several piles were estimated in the presence or with the knowledge of one of the defendants or of their agent; that these piles were marked with the initials of the company, with the quantity in each pile; and that these piles so marked were subsequently sold to the plaintiff. The fact is admitted that before such sale the company had made advances on the contract amounting to \$5,467.87. It is not necessary to refer to anything subsequently done by the parties under the contract. Certainly nothing was done by the plaintiff or by her assignor to complete her title to the lumber in controversy, or which

Galloway vs. Week and another.

would in any way strengthen her rights. There is no evidence that the parties understood or agreed that the piles so marked by the agents of the company should become its property from that time, or that both parties participated in this measurement, if it was one; and surely there should be some evidence that the defendants assented to what was done as to the marking, and agreed that the title to those particular piles of lumber should pass, for it was essential that the minds of the parties should meet on that point in order to make a complete sale. The *onus* was upon the plaintiff to establish these facts — as she affirms that what was then done amounted to a complete sale,— and to offer some evidence that the parties intended by those acts an absolute transfer of the title to those piles of lumber. We feel authorized in saying that there is no evidence whatever to justify the inference that the parties intended that the piles of lumber so marked should become the property of the company.

It follows from these views that there is nothing in the rulings of the court on the trial or in the charge, of which the plaintiff can complain, because she shows no title to the lumber in controversy. The learned circuit court held in effect that, in order to pass the title to any lumber under the contract, it was necessary not only that the monthly estimate of the entire cut in the yard should be made, and sixty-five per cent. of the quantity ascertained and designated, but that \$12 per thousand should also be paid. We do not think this was a correct view of the contract; but the error of the court in that regard could not have prejudiced the plaintiff, in view of the important fact that no estimate, as required by the contract, was ever made. The judgment was therefore right, notwithstanding this error of the court.

By the Court.— Judgment affirmed.

VOL. LIV — 39

Jewell vs. The Chicago, St. Paul & Minneapolis R'y Co.

JEWELL VS. THE CHICAGO, ST. PAUL & MINNEAPOLIS RAIL-
WAY COMPANY.

March 16 — April 5, 1882.

RAILROADS: CONTRIBUTORY NEGLIGENCE: COURT AND JURY. (1) *What constitutes contributory negligence: Its effect.* (2) *When question of contributory negligence for the court.* (3) *Submitting questions for special verdict.*

1. One who passed out of a railway car and got upon the platform thereof, and attempted to step or jump from the car, while it was in motion, cannot recover for injuries suffered in consequence thereof, even though he had reached his place of destination, and the train, which had previously stopped to permit passengers to alight, had not so stopped for a reasonable length of time.
2. Upon the admitted facts and those shown by undisputed evidence in this case, this court holds that the court below erred in not setting aside special findings of the jury to the effect that the plaintiff was not guilty of contributory negligence, and granting a new trial, though there was also a general verdict in plaintiff's favor.
3. Each question submitted to a jury for a special verdict should be limited to a single, direct and controverted issue of fact, and should be so stated that the answer will necessarily be positive, direct and intelligible.

APPEAL from the Circuit Court for *St. Croix* County.

About October 1, 1879, the plaintiff, who was then a milliner and dressmaker, about fifty-two or fifty-three years of age, residing at the village of Hammond, a station on the defendant's railway between St. Paul and Elroy, traveled as a passenger on one of the defendant's passenger trains from St. Paul to Hammond. The train reached Hammond at about half past ten o'clock in the evening; and the complaint alleges that while the plaintiff was getting off of the train at the station, "the defendant so carelessly, negligently and unskillfully managed the train, by starting up said train before she could get off onto the platform at said station, that she was violently thrown down," etc.; and for a second cause of action, that "the defendant so carelessly, negligently and unskillfully

managed said train with reference to the platform built, occupied and used at said station for passengers getting off from said train, that the plaintiff, in getting off, was violently thrown down upon said platform," etc. The answer denied the negligence of the company, and alleged contributory negligence on the plaintiff's part. The evidence given on the trial sufficiently appears from the opinion. The jury returned a special verdict upon questions submitted to them by the court, the material parts of which are as follows:

1. Was the defendant's train upon which the plaintiff was a passenger on the evening when the injuries were received by the plaintiff, stopped at the platform in the first instance a sufficient length of time to enable the plaintiff, in the exercise of due diligence, to have safely alighted therefrom? *Answer.* No.

2. Did said train stop twice before the plaintiff left the platform? *Answer.* Yes.

3. Was the plaintiff, while standing upon the steps of the car platform, thrown therefrom by the sudden starting of the train? *Answer.* Yes.

4. Did the plaintiff voluntarily step or jump from the cars onto the platform? *Answer.* No.

6. Was the plaintiff warned by the brakeman and by bystanders not to step off the cars while in motion? *Answer.* Yes.

7. Was the plaintiff, in her efforts to alight from the car in question, guilty of any want of ordinary care that materially contributed to the injury complained of? *Answer.* No.

8. Were the defendant's agents guilty of negligence either in not stopping long enough to allow the plaintiff to alight from the train, or in suddenly starting the train after the plaintiff came upon the platform on her way from the car to the depot platform? *Answer.* Yes.

9. If you answer yes to the last question, then did the plaintiff's injury result from such negligence without any

Jewell vs. The Chicago, St. Paul & Minneapolis R'y Co.

contributory negligence on the part of the plaintiff? *Answer.* Yes.

12. Did the plaintiff believe that, at the time the cars stopped the second time, they stopped for the purpose of allowing her to get off the cars? *Answer.* Yes.

13. Did the plaintiff attempt to leave the car while the train was in motion, either by stepping down the steps of the car platform or by jumping therefrom after having been warned not to do so, and notwithstanding the efforts of bystanders to physically prevent her from so doing? *Answer.* No.

There was also a general verdict for the plaintiff. The question of damages was, by stipulation, taken from the consideration of this court. From a judgment on the verdict in favor of the plaintiff, the defendant appealed.

William E. Carter, for the appellant.

For the respondent there was a brief by *L. P. Wetherby* and *N. H. Clapp*, her attorneys, with *R. M. Bashford*, of counsel.

CASSIDAY, J. For the purposes of this appeal, we assume that there is evidence sufficient to justify the jury in finding that the train did not stop in the first instance for a sufficient length of time to enable the plaintiff, in the exercise of due diligence, to get off the train with safety; notwithstanding the undisputed occurrences during the stoppage, as detailed by the plaintiff's own witnesses, would seem to demonstrate that a sufficient time did elapse while the train was at rest to enable the plaintiff to get off. Does the undisputed evidence show that the plaintiff was guilty of contributory negligence? The undisputed evidence shows that the train started the first time just before the plaintiff passed out of the car in which she was riding, onto the front platform of the same, and that she so passed out while the train was in motion.

It also appears, from evidence which amounts to a demon-

Jewell vs. The Chicago, St. Paul & Minneapolis R'y Co.

stration, and which is not disputed by any direct testimony, but merely by certain inferences to be drawn from some statements of the plaintiff, and perhaps one or two of the other witnesses, that when the train stopped the second time the door of the baggage car had not passed the east end of the depot platform, and that the conductor, Pemberthy and his sister, were there near where the plaintiff subsequently fell onto the depot platform, and while there the train started the second time. That this is so seems to be overwhelmingly demonstrated by all the facts and occurrences detailed in the evidence. This being established, and the fact being evident of there being a smoking car between the baggage car and the ladies' car, it conclusively follows that, after the train started the second time, the plaintiff, on the front end of the ladies' car, moved eastward at least half the length of the baggage car and the length of the smoking car, with the intervening spaces, before she reached the place where she struck the depot platform. Even had there been no smoking car, as some seemed to think, yet, as the door of the baggage car was at the point named when the car started the second time, the plaintiff must thereafter have moved eastward upon the platform and steps of the ladies' car at least half the length of the baggage car and the intervening space between that and the next car, before she reached the place where she struck the depot platform.

It is very certain, from Pemberthy's evidence, that when, after leaving the conductor and on his way to the west end of the depot, he saw the plaintiff standing on the front platform of the ladies' car, the train was moving after having started the second time. The plaintiff's theory is, that, after the conductor had stopped the train to get Pemberthy's trunk, and while it was standing still, and while she was in the act of passing from the steps at the front end of the ladies' car onto the depot platform, the train suddenly started, and that she was thereby thrown onto the depot platform by the jerk. Had

Jewell vs. The Chicago, St. Paul & Minneapolis R'y Co.

this been so, she would necessarily have fallen many feet west of where she actually did fall; for, at the very instant when the train so started the second time, and when she claims she was so jerked off, the conductor and Pemberthy were on the east end of the depot platform, nearly opposite the door of the baggage car, and at or near the very spot where all agree she subsequently landed upon the depot platform. Another difficulty with the plaintiff's theory is, that had she been thrown from the steps of the car platform by the sudden starting of the train, and without any voluntary step or jump from the car onto the depot platform, as found by the jury, then she would necessarily have been thrown lengthwise of or by the side of the train, and not laterally onto the depot platform, as she was thrown. Can we say there is evidence, *not in conflict with the admitted facts*, tending to prove the plaintiff's theory, and sufficient to sustain a verdict to that effect?

The plaintiff concedes that she was attempting to get from the car steps onto the depot platform at the instant she claims she was jerked off; so the fact of her being in the act of voluntarily stepping from the car onto the depot platform is confessed, notwithstanding the special finding of the jury to the contrary, the only dispute being whether such voluntary stepping took place while the train was at rest or in motion. The plaintiff testified, in effect, that the man who assisted her and went out of the car ahead of her, told her not to attempt to get off the train while it was in motion, but that no one else was present or said anything to her about it. The jury, on the contrary, found that the brakeman and bystanders warned her not to get off while the cars were in motion. She concedes, in effect, that she did attempt to go down the steps, and got onto the first step, and she don't know but she got onto the second step, and that the man who assisted her was below her on the step; that she was anxious to get off the car, but was not much excited until she had stepped down onto the first step, and the train started up, when she became afraid she

Jewell vs. The Chicago, St. Paul & Minneapolis R'y Co.

would be thrown off, and then tried to hold on, and became frightened. Jennie Wilson testified, in behalf of the plaintiff, in effect, that she was standing at the depot door at the time; that she did not see the plaintiff fall, because she supposed she would be killed, and so covered her eyes; that she saw the plaintiff "*on the platform when the train started the second time;*" that "the platform of the car on which she stood had not got by her when the train made the second stop, but was eight or ten feet west of her; that the train had stopped or slackened up, before it passed her, but she did not know as it stopped perfectly still. If it did, it was just for an instant; but it slackened."

The fact is stated by this witness, that the place where the plaintiff was when the train stopped or slackened was some distance west of where she stood at the depot door, while the place where she went onto the depot platform was shown conclusively to have been some feet east of where she stood; and hence her testimony in this regard is in direct conflict with the plaintiff's theory, and in harmony with the defendant's theory. The same may be said of the evidence of the plaintiff's daughter, who testified, in effect, that she was on the depot platform, on the east side of the depot door, when the train stopped; and that the car was in motion when she saw her mother go past her, standing on the lower step of the platform. Of course, but little reliance can be placed upon duration not measured by conduct, nor distance not measured by objects or measurements. A very careful reading and analysis of the testimony fails to disclose any evidence to sustain the fourth finding, that the plaintiff did not voluntarily step or jump from the cars onto the platform, except certain statements of the plaintiff and inferences which the admitted facts, and facts established by undisputed evidence, clearly show could not possibly exist. The same may be said with reference to the third finding of the jury, to the effect that the plaintiff, while standing upon the steps of the car platform, was thrown there-

Jewell vs. The Chicago, St. Paul & Minneapolis R'y Co.

from by the sudden starting of the train. The same is true, at least in part, of the thirteenth finding above stated.

We must conclude from the admitted facts, and facts established by evidence and circumstances not disputed, and which are of such a character as to preclude the possibility of the correctness of any contrary inference or statement, that the plaintiff not only went out of the car in which she was riding, onto the platform of the same, while the train was in motion, but that she also went down onto the steps, and from there stepped or jumped onto the depot platform, while the train was in motion. The question therefore recurs, whether such conduct on her part was contributory negligence.

In *Railroad Co. v. Aspell*, 23 Pa. St., 147, it was held that "a passenger who has been negligently carried beyond a station where he intended to stop, and where he had a right to be let off, may recover compensation for the inconvenience, loss of time, and labor of traveling back; but where the plaintiff, under such circumstances, jumped off the car when in motion, though warned not to do so, it was held that he could not recover for the injury sustained."

In *Gavett v. Railroad Co.*, 16 Gray, 501, it was held that "a passenger in a railroad car who, knowing that the train is in motion, goes out of the car and steps upon the platform of the station while the train is still in motion, is so wanting in ordinary care as not to be entitled to maintain an action against the railroad corporation for an injury therefrom."

In *Hickey v. Railroad Co.*, 14 Allen, 429, it was held that "a traveler by railroad cannot maintain an action against a railroad company to recover damages for personal injury sustained by him in consequence of his voluntarily and unnecessarily standing upon the platform of a passenger car while the train is in motion." See also *Nichols v. Railroad Co.*, 106 Mass., 463; *Harvey v. Railroad Co.*, 116 Mass., 269; *I. C. Railroad Co. v. Able*, 59 Ill., 131; *O. & M. Railroad Co. v. Schiebe*, 44 Ill., 460; *Burrows v. Railway Co.*, 63 N. Y.,

Jewell vs. The Chicago, St. Paul & Minneapolis R'y Co.

556; *Morrison v. Railway Co.*, 56 N. Y., 302; *Jeffersonville Railroad Co. v. Swift*, 28 Ind., 459; *C. & A. Railroad Co. v. Randolph*, 53 Ill., 510; *I. C. Railroad Co. v. Slatten*, 54 Ill., 133; *O. & M. Railway Co. v. Stratton*, 78 Ill., 88; *C. & N. W. Railway Co. v. Scates*, 90 Ill., 586.

In *Secor v. Railroad Co.*, 10 Fed. Rep., 15, a passenger on a train that had approached a station and was still moving slowly, stood on the lower step of a car, in the act of stepping to the platform of the station, when, in consequence of the car being moved forward with a jerk, he was thrown upon the platform and injured; and DRUMMOND, C. J., "held that he was guilty of contributory negligence in attempting to alight from the train while it was in motion." *Bon v. Railway P. Ass. Co.*, 10 N. W. Rep. (Iowa), 225; *L. S. & M. S. Railway Co. v. Bangs*, 11 N. W. Rep. (Mich.), 276.

The cases cited are clearly in harmony with *Davis v. Railway Co.*, 18 Wis., 175. In the light of these authorities we must hold that, even assuming that the train did not stop in the first instance a sufficient length of time to enable the plaintiff in the exercise of due diligence to get off the car in safety, yet, as she passed out of the car and went down onto the steps of the car platform, and from thence stepped or jumped onto the depot platform while the train was in motion, contrary to the warning of the brakeman and bystanders who were present, she must be deemed guilty of negligence which materially contributed to the injury complained of, and hence the seventh and ninth findings of the jury are not supported by the evidence.

We are not certain but we would be justified in reversing the judgment by reason of irregularities in the submission of the case to the jury. The eighth question submitted was: "Were the defendant's agents guilty of negligence, either in not stopping long enough to allow the plaintiff to alight from the train, or in suddenly starting the train after the plaintiff came upon the platform, on her way from the car to the depot platform." To this the jury answered "Yes." Whether the

Jewell vs. The Chicago, St. Paul & Minneapolis R'y Co.

answer is to the first part *or* to the last part, it is impossible to tell. If the answer is to the first part of the question, then does it refer to the stopping of the train in the first instance, involved in the first question submitted, or to the second stopping of the train? If to the first stop, then it was already covered; if to the second, then it was immaterial, as it was conceded that that stop was but for an instant. If, on the contrary, the answer does not apply to the first part of the question, but to the last part, then it makes the negligence to consist wholly "in suddenly starting the train after the plaintiff came upon the platform on her way from the car to the depot platform," whereas that act of itself does not necessarily involve any want of care on the part of the defendant; and yet the ninth and tenth questions each assume that it did involve a want of care. Besides, the jury had already found, in answer to the third question submitted, that the train suddenly started while the plaintiff was standing upon the steps of the car platform. Again, the propriety of submitting the twelfth question to the jury may be doubtful, since it is not very manifest that it involves any material issue. Again, the general verdict seems to be in conflict with some of the special findings—notably the sixth. In submitting special verdicts to a jury, each question submitted should be limited to a single, direct and material controverted issue of fact, and in such a way that the answer will necessarily be positive, direct and intelligible. *Eberhardt v. Sanger*, 51 Wis., 72, and cases there cited. But we do not base our decision upon the irregularities in the verdict, as they were not discussed on the argument, and may have been committed at the instance of the defendant's counsel. Whether a general verdict can serve to sustain a judgment where there is a special verdict purporting to cover all the material and controverted issues of fact in the case, but some of which are conflicting or contrary to the evidence, *quære*.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

Cockburn and another vs. The Ashland Lumber Co.

COCKBURN and another vs. THE ASHLAND LUMBER COMPANY.

March 16 — April 5, 1882.

Executory contract for sale of goods: Measure of damages for a breach on vendor's part: Evidence.

1. In an action for the breach of an executory contract to sell and deliver goods, the measure of damages generally is, the difference between the contract price and the market price of the goods at the time and place of delivery specified in the contract. But this rule is inapplicable where the purchaser could not go into the market at the agreed time and place for delivery, and obtain the goods.
2. The contract in this case requiring delivery of certain kinds of lumber in large quantities, by the defendant company to the plaintiffs, on defendant's docks at Ashland in this state at specified times, the court erred in admitting evidence for the defendant to show that plaintiffs could have procured the lumber to be manufactured at some of the mills on the Wisconsin Central Railway between Ashland and Stevens Point — there being no evidence that plaintiffs had notice beforehand of defendant's intended default, or that *after such default* they could have procured at such mills lumber of the required kinds, and placed it in Ashland ready for shipment at the times and in the manner required by the contract. What the rule would be if they had had such notice, and could thus have supplied themselves, not considered.
3. Plaintiffs in this case are entitled to recover such damages as did arise and would naturally arise according to the usual course of things, from defendant's breach of contract, or such as may reasonably be supposed to have been in the contemplation of both parties when they made the contract, as the probable result of such a breach of it, but not such as arose from special circumstances under which plaintiffs entered into the contract, unknown to the defendant at that time.
4. Thus, plaintiffs were entitled to show that the lumber purchased was intended for shipment to Q., and that this was known to defendant at the date of the contract; and thereupon their damages would be ascertained by adding to the contract price of the lumber at the agreed time and place of delivery, the cost of transporting it to Q. (including insurance), and the fees of inspection, and any other expenses usual and necessary in putting the lumber upon the market at Q., and deducting this amount from the market price at Q. at the time when it would have reached that place if there had been no breach of the contract.

Cockburn and another vs. The Ashland Lumber Co.

APPEAL from the Circuit Court for *Eau Claire* County.

The action was to recover damages for the entire failure of the defendant to fulfill a contract in writing entered into by the parties for the sale and purchase of two cargoes of a kind of lumber known as "deals." The contract was as follows:

"It is this day, the 5th day of February, 1878, mutually agreed between the *Ashland Lumber Company*, of Ashland, Wisconsin, and *McRae & Cockburn*, of Loudvie and Toronto Canada, that the first-named parties sell, and the second-named parties purchase, two cargoes of white pine deals, each cargo to be of about 300,000 feet, board measure, and to be of the following specification of qualities and sizes, and not less than seventy-five per cent. first quality and not more than twenty-five per cent. second quality, all three inches thick; eighty-five per cent. twelve feet long; five per cent. eight to ten feet long, principally ten feet; ten per cent. thirteen to twenty feet long, principally sixteen feet; ninety per cent. eleven inches and up wide; ten per cent. seven to ten inches wide. The whole to average not less than 14½ inches wide. All to be well manufactured and square butted, and culled in accordance to the Quebec custom of culling such qualities and sizes, and by a qualified culler appointed by purchasers. Sellers to pile the said deals on their docks and property in Ashland, two or three cross-pieces of dry seasoned slats between each layer or row of deals, and sufficient space between each deal of each row (to the approval of purchasers) so as to admit of a free current of air between each deal.

"One cargo to be ready for shipment on or before the 1st of July next; second cargo to be ready for shipment on or before the 20th of July next; seller delivering each cargo on rail of schooner sent by purchasers for them, and as fast as required by master of the vessels; it being understood purchasers are to send the vessels within thirty days after the respective dates mentioned above for delivering of each cargo. Purchasers to pay for said deals at the rate of \$18, American currency, per

Cockburn and another vs. The Ashland Lumber Co.

1,000 feet, board measure, for the first quality, and at the rate of \$10, American currency, for 1,000 feet, board measure, for the second quality, when shipped on board the schooner at Ashland, Wisconsin. Purchasers agree to make sellers advances on the foregoing contract to the extent of \$3,000, by purchasers' acceptance of C. Stadely's drafts, say one draft payable the 10th of March next for \$1,000; one draft payable the 10th of April next for \$1,000; one draft payable the 10th of May next for \$1,000,—sellers paying purchasers interest on such advances at the rate of ten per cent. per annum from date of maturity to shipment of cargoes.

"Dated and signed in Ashland, Wisconsin, this 5th day of February, 1878."

Judgment is demanded for \$6,109.61. The plaintiffs had a verdict for \$50. They moved for a new trial, and appealed from an order denying the motion. The case is further stated in the opinion.

For the appellants there was a brief by *J. J. Miles*, their attorney, with *J. M. Bingham*, of counsel, and oral argument by *Mr. Bingham*.

For the respondent there was a brief signed by *L. M. Vilas*, of counsel, with *John H. Knight* and *W. M. Tompkins*, its attorneys, and oral argument by *Mr. Vilas*:

1. It is well settled that the ordinary measure of damages recoverable for the failure of the vendor in such a contract, is the difference between the contract price and the actual market value of the chattels at the time when and place where they should have been delivered. 1 Sedgw. on Dam. (7th ed.), 552 and note; Benjamin on Sales, sec. 870; *Richardson v. Chynoweth*, 26 Wis., 656; *Chapman v. Ingram*, 30 id., 290; *Gregory v. McDowel*, 8 Wend., 434; *Dana v. Fiedler*, 2 Kern., 40; *Cohen v. Platt*, 69 N. Y., 348. Nor does it seem that this established rule should be varied or qualified by the determination of the fact whether, at the time of the breach, there may be for sale in the market a sufficient quantity of the

Cockburn and another vs. The Ashland Lumber Co.

chattels contracted for to enable the vendee to immediately supply himself. If a market price be proven at the place of delivery specified in the broken contract, that price must control in estimating the damages, without regard to the supply in the market at the time. *Jemison v. Gray*, 29 Iowa, 537; *Richardson v. Chynoweth*, *supra*. If no market price can be readily or clearly shown at the place of delivery in the contract, evidence may be given of the market value at other places in the vicinity, for the purpose only, however, of approximately ascertaining and fixing the market value of the articles at the place where they should have been delivered, and not to substitute as a measure of damages the value at such other places. *Berry v. Dwinel*, 44 Maine, 255; *Young v. Lloyd*, 65 Pa. St., 199; *Wemple v. Stewart*, 22 Barb., 154; *Cohen v. Platt*, *supra*. The instructions given by the court were in harmony with these principles. The instruction asked by plaintiffs, and refused, was not; and it also entirely ignored the risk and perils of navigation, for which a great deduction must always be made, whenever a distant and foreign market is resorted to for evidence in ascertaining such damages. *Harris v. Panama R. R. Co.*, 58 N. Y., 660.

2. The loss of profits on the contract for resale was not in contemplation of the parties at the time when their contract was made, and was not the natural and direct result of defendant's breach of contract, and hence not recoverable in this action. The allegations in the complaint in regard thereto were properly stricken out, for the reason that they were insufficient, if proven, to permit a recovery of the lost profits. The evidence offered was neither admissible under the complaint as it was originally served, nor as it stood at the time of trial, since such evidence was not sufficient to warrant the claim to recover such profits as a part of appellant's general damages for the breach of contract. *Hadley v. Baxendale*, 9 Exch., 341; *Harvey v. R. R. Co.*, 124 Mass., 421; Benjamin on Sales, sec. 870; *Parsons v. Sutton*, 66 N. Y., 92;

Cockburn and another vs. The Ashland Lumber Co.

Laird v. Townsend, 5 Hun, 107. 3. The evidence to show a nearer and cheaper market for deals than Quebec was better, fairer and more competent evidence of value, in estimating the damages, than the value at Quebec. If it established such a market, the value at Quebec could not be considered by the jury. *Grand Tower Co. v. Phillips*, 23 Wall., 471. To justify a reference to a distant market, there must really be no other. *Coxe v. England*, 65 Pa. St., 212.

LYON, J. It is conceded that none of the lumber contracted for was ever delivered by the defendant company, and it is not claimed that the plaintiffs made any default in the performance of the contract on their part. The plaintiffs are therefore entitled to recover in the action, and the only matter to be determined on this appeal is the rule of damages. The general rule in actions to recover damages for the breach of an executory contract to sell and deliver goods, is that the difference between the market price of the goods at the time and place specified in the contract for delivering the same, and the contract price, is the measure of damages. The basis of this rule is, that on failure of the vendor to deliver the purchaser may go into the market at the time and place of delivery, and supply himself with the same kind of goods at the market price. Hence, the difference between what he is compelled to pay for the goods, and what they would have cost him had the vendor performed his contract, justly measures the damages which he has sustained by the breach of the contract. But this rule presupposes that the purchasers may go into the market at the agreed time and place of delivery and obtain the goods. If no such goods can then be obtained at that place, there can be no market price there by which to measure the purchasers' damages. The idea that there can be a real, substantial market price for a given commodity, when there is no such commodity for sale in the market, is absurd. If, therefore, there were no deals for sale in the Ashland market from July 1 to

Cockburn and another vs. The Ashland Lumber Co.

20, 1878—the times of delivery specified in the contract,—of the grades and dimension therein specified, we must find some other rule by which to measure the plaintiffs' damages.

Testimony was given on behalf of the defendant that there was a market price for deals of the grades specified in the contract at Ashland and Bayfield, and that the same price obtained in Ontonagon and Hancock—the former place being 100 and the latter 120 miles distant from Ashland. We need not stop to inquire how the plaintiffs would be affected thereby could they have purchased a like quantity, quality and description of deals in those markets in July, 1878, because there is really no evidence that they could have procured the same in either or all of them. The evidence is conclusive that they could not have supplied themselves in the markets of Ashland or Bayfield. As to Ontonagon, the only testimony is that there were 3,000,000 feet of logs there in 1878, which would make twenty-five per cent. of deals of the quality specified in the contract. There is no evidence that any deals were cut or that they could have been procured at that place during that year. There is evidence to the effect that 600,000 or 700,000 feet were manufactured at Hancock in 1878. The grade or dimensions of the Hancock deals, or the time when manufactured, does not appear. It does appear, however, that the same were manufactured for Chicago parties. The evidence would not support a finding or verdict that deals were kept in stock for general sale at any of these places, or at any place in the Lake Superior region. All of the proofs tend to show that this kind of lumber is usually manufactured to fill special contracts therefor. It is not claimed that the defendant company informed the plaintiffs they could obtain the deals elsewhere; and the managing owner of the company testified that the company could not have purchased the same. If it could not, it is difficult to understand how or where the plaintiffs could do so.

We conclude that the evidence fails entirely to show that

Cockburn and another vs. The Ashland Lumber Co.

the plaintiffs could have purchased any deals like those specified in the contract, at any of the places before mentioned, in July, 1878, and hence that there was no market price for such deals at any of those places; or, at most, but a merely nominal market price, which furnishes no basis for ascertaining the plaintiffs' damages.

The learned circuit judge submitted the question to the jury whether there was a market price at Ashland, or in that vicinity, for such deals as the contract called for, at the time the same were agreed to be delivered, and whether the plaintiffs could have then purchased the same in the Ashland market, or in that vicinity. There being no sufficient evidence to support an affirmative finding on that question, it was error to submit it to the jury. *Spaulding v. C. & N. W. Railway Co.*, 33 Wis., 582, and cases cited; *Read v. Morse*, 34 Wis., 315.

The court admitted testimony tending to show that the plaintiffs could have procured the deals to be manufactured at some of the mills on the Wisconsin Central Railway between Ashland and Stevens Point. We think the testimony should have been rejected. We find no proof that the plaintiffs had any notice that the defendant company would not perform its contract, until it made default; that is, until July 1, 1878. There is no proof whatever that the plaintiffs, after that time, could have supplied themselves with deals at those mills of the grades and dimensions specified in the contract, and placed the same in Ashland, piled for shipment, at the times and in the manner required by the contract.

Until they had notice to the contrary, the plaintiffs might well rely on their contract with the defendant to obtain the deals; and, before the defendant can be allowed to show that deals might have been obtained by the plaintiffs at the mills on the railway, it must show not only that deals of the grades and dimensions specified in the contract could have been thus obtained, but that the plaintiffs had sufficient time after notice

Cockburn and another vs. The Ashland Lumber Co.

that the defendant would not deliver the deals, and before July 1st and July 20th, respectively, to purchase the same at the mills and place them in Ashland (or at some equally accessible point on Lake Superior) for shipment, piled in the manner specified in the contract. Had it been made to appear that the plaintiffs had notice in due time that the defendant would not perform its contract, so that they could have contracted with mill-owners along the line of the railway for the deals, and could have had them ready at Ashland for shipment in the condition and at the times called for by their contract with the defendant, we should have a case presenting questions not in the present case, and which will not be here determined.

What, then, is the rule of damages in a case like this? In the leading case of *Hadley v. Baxendale*, 9 Exch., 341 (*S. C.*, 26 Eng. Law & Eq., 398), the doctrine of which has been adopted by this and many other courts, the rule applicable to this case was thus stated by Baron ALDERSON: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most,

Cockburn and another vs. The Ashland Lumber Co.

could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them."

Among the cases in this court in which the rule of *Hadley v. Baxendale* has been approved and applied, are the following: *Shepard v. Mil. Gas Light Co.*, 15 Wis., 318; *Richardson v. Chynoweth*, 26 Wis., 656; *Chapman v. Ingram*, 30 Wis., 290. See also *Ingram v. Rankin*, 47 Wis., 406. Many of the adjudications in other courts upholding the rule of *Hadley v. Baxendale* are cited and commented upon in the opinions in the above cases. It is unnecessary further to refer to them here. A very learned and elaborate note, in which a large number of cases, both English and American, bearing upon and approving the different branches of the above rule are collated, will be found in 1 Sedg. Dam. (7th ed.), 218.

The amended complaint contained allegations that plaintiffs purchased the deals for resale at Quebec; that they had in fact contracted to sell them to parties there in October preceding at a stipulated price largely in advance of the price which they agreed to pay the defendant therefor; and that they notified the defendant on July 8, 1878, that they had so contracted for a resale of the deals. This portion of the complaint was stricken out by the court on motion of the defendant. This ruling was correct. To bind the defendant by the price stipulated for on a resale, he must have had notice of such resale when the contract was made, though, perhaps, not of the contract price. In the absence of such notice it cannot fairly be said that the special damages which the plaintiffs suffered because of their inability to fulfill their contract with the Quebec parties may reasonably be supposed to have been within the

Cockburn and another vs. The Ashland Lumber Co.

contemplation of both parties at the time they made the contract upon which the present action is based. The complaint only alleged a notice given several months after such contract was made. It therefore failed to state facts to entitle the plaintiffs to recover the special damages resulting from the loss of their contract with the Quebec parties. Numerous cases to this effect are cited in Mr. Sedgwick's note to *Hadley v. Baxendale*, *supra*.

But with the above allegations there was also stricken from the complaint an allegation that at the time of making the contract the defendant had notice that the plaintiffs purchased the deals for shipment to and resale at Quebec. This is very different from the other allegation, that the defendant had notice on July 8th that the plaintiffs had already contracted for a resale, and, as we shall presently see, should not have been stricken out.

Testimony was offered by the plaintiffs on the trial to prove the allegations thus properly stricken from the complaint, but it was rejected by the court. It is an elementary rule that to entitle the plaintiff to prove special damages, in an action to recover damages, he must allege in his complaint the facts which entitle him thereto. No such facts as to a resale being alleged in this complaint, the testimony was properly rejected.

It was, however, alleged in the complaint (as already stated) that the deals were purchased for shipment to Quebec, and the undisputed evidence is that the defendant company had notice of the fact when the contract of February 5, 1878, was made. The evidence having been received, the plaintiffs are entitled to the benefit of it, the same as though the averment had been retained in the complaint. It may reasonably be presumed that when the contract was made the defendant knew that, should it fail to deliver the deals as agreed, the plaintiffs would be unable to procure them by the agreed time of delivery at Ashland, or in any other Lake Superior lumber market.

Whether the plaintiffs intended to sell the deals in the Que-

Cockburn and another vs. The Ashland Lumber Co.

bec market or not, they purchased them for shipment to that market, and for some use there, and by any just rule they are entitled, under the peculiar circumstances of the case, to have the benefit of the market price there in the estimate of their damages. We think it may reasonably be supposed that the parties contemplated this as a result of a breach of the defendant's agreement to deliver the deals. The defendant company was cognizant of facts which make such presumption almost conclusive against it. Hence, within the rule of *Hadley v. Baxendale*, the market price at Quebec of deals like those contracted for, at the times when in the usual course of transportation they could have reached there had both parties fulfilled their contract, say in August and September, 1878, is the true basis upon which the plaintiffs' damages should be assessed. From this value should be deducted the cost of transportation, including insurance, the fees for inspection, and any other expenses (if there were any) usual and necessary to put the deals upon the market. The difference between that balance and the contract price is, we think, the proper measure of the plaintiffs' damages, as the case now stands.

This seems to us to be the correct application of the rule of *Hadley v. Baxendale* to the present case; and the application is sustained in principle by several of the cases above referred to.

The jury were instructed that they might consider the evidence of the market value of deals in Quebec, but "only so far as it may throw light upon the real state of the market at Ashland and vicinity." This was an improper restriction upon the effect of the evidence, which, when considered with other portions of the charge before mentioned, could scarcely fail to be injurious to the plaintiffs. The jury should have been instructed that the evidence should be considered by them as determining the value of the deals to the plaintiffs at Ashland, the agreed place of delivery.

On behalf of the plaintiffs the following instruction was

Gunsolus and others vs. Lormer and others.

prayed, but the court refused to give it: "If the jury believe lumber of the dimensions mentioned in the contract in evidence could not be obtained at Ashland, the place of delivery mentioned in said contract, by the plaintiffs, to be taken to the market at the time when the lumber was by said contract to have been delivered, then they may consider what was the then price of such lumber at Quebec, and the expense of transporting the same from Ashland to Quebec, together with the cost of inspection, and in that way ascertain the value of such lumber to the plaintiffs at Ashland, and the damages which the plaintiffs have sustained by the non-fulfillment of the contract."

Understanding that the cost of insurance is part of the expense of transportation (for that measures the perils of the transit, which is an element in the cost of transportation), we perceive no good reason why the instruction does not state correctly the law applicable to the case. We think that the substance of the instruction should have been given.

Because of the errors above indicated there must be a new trial.

By the Court.—The order appealed from is reversed, and the cause will be remanded with directions to the circuit court to set aside the verdict and award a new trial.

GUNSOLUS and others vs. LORMER and others.

March 17—April 5, 1882.

TRESPASS QUARE CLAUSUM: (1-3) *Who may bring the action.*

MUNICIPAL COURT OF DANE COUNTY. (4) *When judge acts as J. P.*

Form of appeal to circuit court in such cases. (5) Form of judgment of circuit court in such cases.

1. Only the person in the actual or constructive possession of real property can maintain trespass *quare clausum* in reference thereto; and such constructive possession is only that of the owner, when no person is in the actual possession.

Gunsolus and others vs. Lormer and others.

2. Where, after the expiration of his term, one who has been in possession as a lessee, is permitted by a subsequent lessee to remain in possession until the latter shall notify him to remove, he is a tenant at will, and is the only person who can bring trespass *quare clausum* for an unlawful entry on the premises by a third person.
3. The provision of section 4216, R. S., that the possession of the tenant shall be the possession of the landlord, until, etc., merely prevents the tenant, holding over, from claiming possession *adversely* to his landlord.
4. Where cases cognizable by a justice of the peace are brought in the municipal court of Dane county, the judge thereof must act as such a justice; and an appeal from his judgment must be taken in the same manner as from a justice's court.
5. On such an appeal, where there is no new trial in the circuit court, the judgment of that court must be one of affirmance or reversal (in whole or in part), and not an ordinary judgment for one of the parties.

APPEAL from the Circuit Court for *Dane* County.

Defendants appealed from a judgment in favor of the plaintiffs. The case is sufficiently stated in the opinion.

R. M. Bashford and *L. K. Luse*, for the appellants.

For the respondents there was a brief by *Lamb & Jones*, and oral argument by *Mr. Jones*.

ORTON, J. The plaintiffs complain that they were entitled to the possession, and lawfully possessed, of a certain lot in the village of Stoughton, on which was situated a small building and a platform, owned by the Northwestern Mutual Life Insurance Company, and that the defendants unlawfully broke and entered said premises, and unlawfully withhold possession thereof. The defendants answered by a general denial, and giving notice that they would prove on the trial that they entered and held possession of said premises by virtue of a lease from said insurance company. The plaintiffs, on the trial, proved their lease by correspondence with J. J. R. Pease, of Janesville, the pretended agent of the insurance company, and particularly by a letter of theirs dated February 3, 1881, making a proposition to rent the premises, and a letter from said Pease to them, dated February 4, 1881, accepting said proposi-

Gunsolus and others vs. Lormer and others.

tion. There was evidence tending to prove that at that time one John Daws was in possession of said premises, under a lease and paying rent, and had been for some time; and that soon after the fifth day of February the plaintiffs called upon said Daws; and said Daws testified in relation to that interview as follows: "I occupied the building in question; used it for storing stoves. *Gunsolus* saw me early in February about the building; said he had rented it. I told him I could get out any day. He told me that he would let me know when to vacate, and that he would charge me no rent while I remained. I paid rent up to February 5th." *M. V. Gunsolus*, one of the plaintiffs, testified, in relation to that interview, as follows: "On receiving the letters, I went to Mr. Daws and showed him Mr. Pease's postal, and he said he would give me possession at once; that he would move out the next day. I told him he need not hurry. Daws was to stay there until we told him to go. Mr. Daws had told me there was no key, but said he would deliver me possession then and there, as he had a postal from Mr. Pease ordering him to do so. I told Daws that I would pay rent from that time."

It appears, also, that Daws continued and was in the actual occupancy of the premises until and when the defendants entered, as complained of.

It is very clear from this evidence that Daws was the tenant at will of the plaintiffs, and that he was in the actual possession of the premises, and the plaintiffs were not, when the trespass was committed.

Under such circumstances can the plaintiffs maintain against the defendants this action of *quare clausum*? The learned counsel of the respondents refer us to the statute (section 4216, R. S.), which provides that the possession of the tenant shall be the possession of the landlord until the expiration of ten years from the termination of the tenancy, or from the time of the last payment of rent, notwithstanding such tenant may have acquired another title. This statute was not made

to establish a general rule of law, but the rule merely in respect to adverse possession. This statute would prevent Daws from setting up adverse possession of these premises against the plaintiffs, and that is as far as it has application to these parties.

It is objected that Daws is in no sense a tenant at will of the premises, but a mere servant or agent to keep and hold the same for the plaintiffs, and that he had surrendered up the possession to them. But Daws had been a tenant under a lease, paying rent, and enjoying and using the premises for certain purposes. He was allowed by the plaintiffs to continue in the possession and actual occupancy of the premises for the same purpose, until he should receive notice to vacate them or surrender them to the plaintiffs.

The case of *Stoltz v. Kretschmar*, 24 Wis., 283, is very much in point. There the plaintiff was the lessee, and he put another in the possession, who had the use of the premises for an indefinite time. The present chief justice said, in the opinion: "This is an action of trespass *quare clausum*. Of course, the gist of the action is an injury done to the possession. Unless a person is in possession of real estate, active or constructive, he cannot maintain the action. This principle is elementary." And, again: "Precisely what Klein's estate was under the agreement — whether he was a tenant at will or for years,— we need not determine." "So, as the plaintiff had not the actual possession of the premises when the injury was committed, he cannot maintain this action. There is no doubt that he could maintain an action on the case for an injury to his reversion as lessee." The case of *Clark v. Smith*, 25 Pa. St., 137, is cited in the opinion, and the following language of Chancellor Kent (4 Kent, 114): "If the tenant be placed upon the land without any terms prescribed, or rent reserved, and as a *mere occupier*, he is strictly a tenant at will."

Daws, as a tenant at will, could have brought this action.

Gunsolus and others vs. Lormer and others.

1 Chit. Pl., 197; Wood's L. & T., 30; *Cross v. Upson*, 17 Wis., 623; *Bartlett v. Perkins*, 13 Me., 87; *Holmes v. Seeley*, 19 Wend., 507; *Herrell v. Sizeland*, 81 Ill., 457. No one can bring this action except the person in actual possession, if there is any one in possession. *Bracken v. Preston*, 1 Pin., 597; *Hungerford v. Redford*, 29 Wis., 345; *Oatman v. Fowler*, 43 Vt., 462; *Addleman v. Wray*, 4 Yeates, 218; 1 Add. Torts, §§ 442, 426. That constructive possession which, in the absence of any actual possession, will warrant the bringing of this action, is that of the owner of the premises alone. *Edwards v. Noyes*, 65 N. Y., 125; *Wickham v. Freeman*, 12 Johns., 183; 6 Wait's Actions & Def., 76-77; *Stean v. Anderson*, 4 Harr. (Del.), 209. See also *Revett v. Brown*, 5 Bing., 7; *Reeder v. Purdy*, 41 Ill., 289. These questions are really elementary, and have been long settled beyond dispute by the courts. It has been necessary to cite scarcely any authorities outside of the brief of the learned counsel of the appellants. The plaintiffs show no right of recovery in the action, and the judgment should for that reason be reversed.

The record in this case is anomalous. The action appears to have been commenced before the Hon. A. B. BRALEY, judge of the municipal court of Dane county, having the jurisdiction of a justice of the peace. The damages claimed are \$12, and the judgment rendered is for six cents and costs. On appeal to the circuit court the return is made by the clerk of the municipal court of Dane county, and under the seal of said court, and there is no return by the said judge of the municipal court, either as judge of that court or as a justice of the peace, "of the testimony, proceedings and judgment," as required by section 3763, R. S., or of any transcript, and there is no certificate by him of any record or proceedings in the case. There was no new trial of the action in the circuit court, and the case was heard upon the above return of the clerk of the municipal court; and the court made and filed findings of fact, and rendered judgment in the ordinary form against the defendants

Gunsolus and others vs. Lormer and others.

for six cents damages and costs. The statute conferring jurisdiction upon the municipal court of Dane county is very plain. In addition to the powers vested in said court, among other powers vested in the judge thereof, he is vested "with all the powers and jurisdiction of justices of the peace in said county in civil actions and proceedings." It is provided further, that "the general provisions of law relative to civil and criminal actions before justices of the peace shall apply to said court so far as applicable;" and that "appeals from judgments rendered in said court in civil actions may be taken to the circuit court for Dane county in the same manner as appeals from judgments of justices of the peace in similar actions." Within the jurisdiction of justices of the peace, the judge of that court acts as a justice of the peace in all respects except that he may try title to lands, and in name. In the findings and judgment of the circuit court in this case he is called a justice of the peace. In the manner in which the return of the record to the circuit court on the appeal by the clerk of the municipal court was made, there is some plausibility in the point made by the learned counsel of the respondents, that there should have been a bill of exceptions.

We do not decide whether, in the absence of any return whatever by the judge who tried this action as a justice of the peace, the circuit court obtained jurisdiction of the cause, or whether such defect was or could be waived by the parties going to trial in the circuit court without objection, because the questions were not raised or discussed by counsel on the argument. We may refer, however, to the case of *State v. Allison*, 47 Wis., 548, in which it was held that cases within the jurisdiction of justices of the peace, tried in the municipal court of Milwaukee county, could not come to this court upon the report of the judge, but that such cases must be treated as in a justice's court.

But objection is taken to the form and regularity of the judgment in the circuit court, that it should have been an

Rowell and another vs. Williams, Adm'r, and another, imp.

affirmance of the judgment of the judge of the municipal court, rather than a common judgment for the plaintiff as upon a new trial. The statute is explicit and mandatory that in all such cases "the appeal shall be heard on the original papers, and the return of the justice containing all the material evidence, and his rulings in the action" (section 3767, R. S.); and that, "in giving judgment, the appellate court may affirm or reverse the judgment of the court below in whole or in part, either as to damages or costs, or both," etc. The appellate court has no other jurisdiction in such an appeal than this specially conferred, and the proceedings outside of or in conflict with these provisions are void. *Bandlow v. Thieme*, 53 Wis., 57; *Bullard v. Kuhl*, ante, p. 544. The return of the justice with the original papers in the cause, constitutes the record and the only record upon which the appellate court hears the cause, and of course no bill of exceptions is necessary. Section 3769, R. S. This statute further provides that the judgment upon the appeal, with the return upon which it was heard, constitutes the judgment roll.

By the Court.—The judgment of the circuit court is reversed and the cause remanded with direction to reverse the judgment of the judge of the municipal court of Dane county.

ROWELL and another vs. WILLIAMS, Administratrix, and another, imp.

March 17 — April 5, 1882.

MORTGAGE. (1) Recording act: "conveyance:" "good faith." (2) Proof that later mortgagee took with notice of prior mortgage. (3) Mortgage: good as between parties, etc., notwithstanding error in description. (4) Consideration of mortgage. (5) Acknowledgment: defect in form.

1. The term "conveyance" in the recording act (sec. 2241, R. S.; sec. 25, ch. 86, R. S. 1858) includes a mortgage; and one who purchases with knowledge of an outstanding incumbrance, or information sufficient to

Rowell and another vs. Williams, Adm'x, and another, imp.

- put him on inquiry, is not a purchaser in "good faith," within the meaning of that statute.
2. Upon the evidence in this case (stated in the opinion) the court below was justified in holding that plaintiffs took their mortgage in suit with notice of the rights of previous mortgagees, notwithstanding errors in the record of the previous mortgages.
 3. Persons owning and occupying the west half and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of a certain section, and intending to mortgage the whole 120 acres, by mistake described the first eighty as the west half of the E. $\frac{1}{4}$, and the mortgage was so recorded; but it recited that it was upon 120 acres. The mortgagors did not own the S. E. $\frac{1}{4}$ of the section. *Held*, that the land described was capable of being made certain by proof, and the mortgage was good as between the parties, and as to them and subsequent mortgagees with notice, must be deemed to cover the 120 acres owned by the mortgagors in the N. E. quarter section.
 4. A mortgage which recites that it was given to secure a promissory note of the mortgagor, *held*, to show a *consideration*.
 5. Whether the omission of the name of the county in the venue of the acknowledgment of a mortgage prevents the record thereof from being constructive notice to a subsequent *bona fide* purchaser, was immaterial in this case.

APPEAL from the Circuit Court for *Columbia County*

Action to foreclose a mortgage. The answering defendants were *Margaret Williams*, administratrix with the will annexed of Robert Williams, and *Beulah Van Buren*, the holder of a prior mortgage. The mortgagors did not answer.

The trial court found in effect the following facts: On the 30th of November, 1858, Robert Davies, being the owner, and, with his wife, in the occupancy and possession, of the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 24, township 13 north, of range 11 east, in Columbia county, executed a note for \$470, with interest at twelve per cent. until paid, and, with his wife, executed a mortgage to Robert Williams, by which they intended to mortgage the whole of said 120 acres of land, to secure the same, though the description of the eighty therein was the W. $\frac{1}{2}$ of the E. $\frac{1}{4}$. Said mortgage was duly recorded April 6, 1859; and there was still

Rowell and another vs. Williams, Adm'x, and another, imp.

due on that note and mortgage June 25, 1879, \$1,153.60, after allowing all payments. On the 5th of February, 1873, the said Robert Davies, being still the owner of the 120 acres in section 24, above described, and also of the N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 21, in the same township and range, and being, with his wife, in the occupancy and possession of the same, gave his note to Julius H. Dawes for \$500, with interest at ten per cent. until paid; and, to secure the payment thereof, he and his wife mortgaged the whole 160 acres to Dawes, which mortgage was recorded February 7, 1873, and no payments had been made thereon except the interest to February 5, 1877. Said mortgage was taken by Dawes with actual notice that the Williams mortgage was intended to cover the whole 120 acres in section 24. Prior to the commencement of this action, *Van Buren* purchased this mortgage of Dawes, with like actual notice. On the 11th of February, 1873, Robert and Ann Davies, for value received, gave to the plaintiffs, as copartners, their note for \$712.64, with interest at ten per cent. until paid, and secured the payment thereof by mortgage upon the whole 160 acres above described, which mortgage was recorded February 14, 1873. Upon this mortgage nothing had been paid except the first year's interest. Plaintiffs took the mortgage with actual notice of the existence of the Williams mortgage, and that the same was intended to cover the whole 120 acres in section 24, and with actual notice of the Dawes mortgage held by *Van Buren*. Each of said mortgages, and of the notes secured thereby, was unsatisfied and unpaid. As conclusions of law, the court held that the Williams mortgage was a lien upon the 120 acres in section 24 prior to each of the other mortgages, and that the Dawes mortgage, assigned to *Van Buren*, was next in order, and was a lien upon the 160 acres prior to the mortgage of the plaintiffs; and it directed that judgment of foreclosure and sale be entered accordingly, and that, out of the proceeds of the sale of the lands covered

Rowell and another vs. Williams, Adm'r, and another, imp.

by said mortgages, respectively, the said mortgage debts be paid in the order of their priority. From the judgment entered accordingly, the plaintiffs appealed.

The cause was submitted for the appellants on briefs of *James J. Dick*.

For the respondent *Margaret Williams* there was a brief by *Morrow & Masters*, and oral argument by *Mr. Morrow*.

CASSODAY, J. Section 2241, R. S., and section 25, ch. 86, R. S. 1858, from which it was taken, only protect subsequent purchasers in good faith for a valuable consideration, and not those who purchase with the knowledge of an outstanding unrecorded conveyance. In such case, to purchase in good faith is to purchase without knowledge of the outstanding incumbrance, or any information sufficient to put the purchaser upon inquiry. *Mueller v. Brigham*, 53 Wis., 173. There can be no question that the term "conveyance," as used in that section, includes a mortgage: Section 2242, R. S., and section 35, ch. 86, R. S. 1858, from which it was taken. Here one of the plaintiffs testified, in effect, that Mr. Davies told him, at the time he gave this mortgage to their firm, that the \$300 note and mortgage (given in 1854, on the 120 acres in section 24 to Williams, and to take up which the Williams mortgage of 1858 was given) were paid; that there was another mortgage of about \$400 held by Mr. or Mrs. Williams; that he supposed he was taking the mortgage to the plaintiffs "on his (Davies') land, and that there was on it a mortgage to Mrs. Williams of \$400," and also the Dawes mortgage of \$500; that Davies did not tell him that the Williams mortgage of the whole place," but said "it was on the place." He also testified that he had no knowledge from Davies or Mrs. Williams, or anybody else, that there was a mistake in the Williams mortgage until they found it out from the description, when

Rowell and another vs. Williams, Adm'r, and another, imp.

they got the abstract, about the time they were talking of foreclosing their mortgage.

With these admissions on the part of the plaintiffs, and the testimony of Mr. Davies, to the effect that when he was about to give the mortgage *Mr. Rowell* asked him if his land was clear, and he told him there were three mortgages on the land,—one of \$300 to Mr. Williams, and another of \$470 to Mr. Williams, and one which he had given the week before to Mr. Dawes for \$500,—and the other evidence in the case, it is very apparent that the circuit court was justified in holding that the plaintiffs took the mortgage with the express understanding that it was subsequent and subject to the Williams mortgage and the Dawes mortgage. This being so, and assuming the Williams mortgage to be a valid subsisting mortgage, the fact of any irregularity in the recording of the mortgage becomes wholly immaterial, since it is the object of the recording acts to protect purchasers and mortgagees for value without notice, and not to protect them when they have notice. For the purposes of this case, therefore, we may assume that the record of the Williams mortgage was not such as to give constructive notice to a *bona fide* purchaser in good faith. Nor is it material that the plaintiffs, at the time of taking their mortgage, did not know the precise amount due on the Williams mortgage, assuming such to be the fact, since they did have information sufficient to put them upon inquiry, and hence they must be presumed to have known what they might readily have ascertained.

It would seem, from the evidence, that the defect in the description of the land in the Williams mortgage was not known to the plaintiffs until they began talking about foreclosing, in 1876, and then they obtained a release of the former Williams mortgage, in which the land was accurately described, apparently for the purpose of preventing its enforcement in case the supposed lien of the second Williams mortgage should

Rowell and another vs. Williams, Adm'x, and another, imp.

be avoided. The mistake consisted in omitting the word "north." The mortgage recited that it contained 120 acres of land, and it is very evident, from reading the description of the 80 and 40 together, that either the word "north" or "south" had been omitted by mistake, otherwise the 40 would include a portion of the 80. Of course, the land to which Davies held title was susceptible of proof, and, as he could only mortgage his own land, and not the lands of others, there was no difficulty in making certain by evidence what was otherwise uncertain. The mortgage was therefore good between the parties, and as to them and the plaintiffs, who took with the notice mentioned, it must be deemed to cover the entire 120 acres in section 24, notwithstanding the mistake referred to. Nor do we think the Williams mortgage invalid by reason of the failure to recite a consideration. It was under seal, and recited that it was given to secure a promissory note of the amount named, executed by the mortgagor, which, of itself, would show a consideration; besides, it here appears that it was given in payment of the former note and mortgage held by Williams. The omission of the name of the county, in the venue of the acknowledgment, may have been such an irregularity as to prevent the record from being constructive notice to *bona fide* purchasers or mortgagees without notice; but the view we have taken of the case makes this immaterial, since the plaintiffs are not such mortgagees, but took their mortgage with actual notice that the Williams mortgage in question then covered the farm of the mortgagor.

By the Court.—The judgment of the circuit court is affirmed.

VOL. LIV — 41

Sumner vs. Sumner, imp.

SUMNER vs. SUMNER, imp.

March 17—April 5, 1882.

DIVORCE. (1) *Power of court as to suit money.* (2) *No abuse of discretion in this case.*

1. Under sec. 2361, R. S., the circuit court in a suit by the wife for divorce has power, upon rendering judgment dismissing the complaint (as well as before judgment), to order the husband to pay such sum as in its discretion it deems necessary to meet the expenses of the prosecution of the suit.
2. Where it appeared that neither party had been blameless in the treatment of the other; that the husband had on several occasions used harsh and insulting language towards the wife; that he advised her to obtain a divorce, under an erroneous impression as to the law; and that plaintiff prosecuted the action in good faith, believing that she had good cause for a divorce: *Held*, that there was no abuse of discretion in requiring the defendant to pay the actual and necessary disbursements of plaintiff's attorney in prosecuting the action, and reasonable fees therefor.

APPEAL from the Circuit Court for *Sauk* County.

The defendant *Sumner* appealed from so much of a judgment of divorce against him as required him to pay \$400 suit money.

The cause was submitted on the brief of *Noyes Bros.*, his attorneys, with *J. W. Lusk*, of counsel, for the appellant, and that of *Levi Crouch*, as attorney, with *G. Stevens*, of counsel, for the respondent.

COLE, C. J. This was an action for divorce on the ground of cruel and inhuman treatment. The circuit court found against the plaintiff on the proofs, and dismissed her complaint. The court further adjudged that the defendant pay the plaintiff the sum of \$400, in addition to the suit money already paid, to reimburse the plaintiff's attorneys for actual and necessary disbursements and reasonable fees in prosecuting the action. The appeal is from that part of the judgment making this allowance to the plaintiff on dismissing her com-

Sumner vs. Sumner, imp.

plaint. It is claimed that the court below had no power, after having heard the cause and decided it in favor of the husband upon the merits, to order him to pay any expenses incurred by the wife in prosecuting the action. But we think this view incorrect, and that the statute (section 2361, R. S.) gave the court full power to adjudge the payment of this money: for the statute expressly authorizes the court to order the husband to pay such a sum as in its discretion is deemed necessary to enable the wife to prosecute her suit; and we see no reason for holding that this power ends when the case is brought to a hearing and the wife fails to sustain her action. It is evident that this was not the view taken of the statute in *Phillips v. Phillips*, 27 Wis., 252. There the wife failed to sustain her action, and this court, upon appeal, affirmed the judgment dismissing her complaint. But still, as it appeared that the wife was without any means whatever, and the husband had not been altogether blameless, he was ordered to pay a portion of the expense incurred by her in prosecuting the appeal.

In divorce suits the circuit court has plenary power over the whole subject of these allowances, both before and after judgment; and this court has said that it would not interfere with the determination of the trial court in the matter, unless there had been an abuse of discretion in making such allowances. *Williams v. Williams*, 29 Wis., 518; *Downer, Adm'r, etc., v. Howard*, 44 Wis., 82. The statute goes on the theory of the wife's dependence upon her husband for the expenses of the litigation (*Coad v. Coad*, 40 Wis., 392), where she has no separate estate. In this case the court below found that the wife had no separate estate out of which costs and disbursements could be paid, and that her actual cash disbursements amounted to \$300. The court also found as facts established by the evidence, that neither party had been blameless in the treatment of the other; that both were persons of somewhat quick and hasty temper; and that the husband, on several oc-

Sumner vs. Sumner, imp.

casions, had used, when addressing her, harsh and insulting language, calling her a fool, damned liar, etc. The court also found that the defendant was willing that the plaintiff should obtain a divorce, and advised her to do so, erroneously supposing that incompatibility of disposition and temper constituted a good ground of divorce; and that the plaintiff believed when she commenced the action, and still believes, that she has good cause for divorce, and has prosecuted the same under the advice of counsel given in good faith. The evidence in the case is not before us, but we must presume that it fully sustained these findings of fact. If it did, then it is very obvious that the conduct of the husband towards his wife has been grossly improper and unjust; that, if he has not been guilty of acts of personal violence in his treatment of her, he has certainly addressed her in unmanly, profane and abusive language. "It may be a salutary admonition to him to govern himself and regulate his conduct in future, if he is required to pay" the amount adjudged by the court below. DIXON, C. J., in *Phillips Phillips, supra*. Under the circumstances, we cannot assume that the amount allowed was unreasonable or oppressive. We must presume, in the absence of all proof, that it was a just and fair allowance, notwithstanding the plaintiff had failed to make out her case. Certainly the court had power to allow it, and there is nothing to show that its discretion in the matter was not wisely exercised.

By the Court.—That part of the judgment appealed from is affirmed.

McCaffrey vs. The Town of Shields.

McCAFFREY VS. THE TOWN OF SHIELDS.

March 18 — April 5, 1882.

POOR LAWS. (1, 2) *Legal duty of town in which pauper has residence but no settlement.* (3) *When liable for relief furnished by private person.*

1. Sec. 1512, R. S., must be so construed as to require the supervisors of a town, in the first instance, to provide for the support, etc., of a pauper resident in such town, but without a settlement therein, under the circumstances there mentioned.
2. Where a person resident in a town, without settlement therein, being mentally or physically disabled from earning a livelihood; and having no money to pay for the necessities of life, goes into another town for a transient purpose only, the fact that such person does not actually require food, shelter and lodging at the public expense until he has passed into such other town, will not relieve the *town of his residence* from the duty of providing for him as required by said sec. 1512.
3. For relief furnished by a private person to one known to be a pauper and a legal charge upon a town, the town is not liable unless its supervisors, or at least two of them, have authorized the furnishing of such relief. *Mappes v. The Supervisors*, 47 Wis., 31, distinguished.

APPEAL from the Circuit Court for *Marquette County*.

Action to recover for the board and lodging of one Caroline Kooch, alleged to be a pauper for whose maintenance the defendant town is chargeable. The testimony tends to prove that the said Caroline became a resident of the defendant town in June, 1879; that she was a single woman, without means, and supported herself in whole or in part by her labor; that in February following she went into another town, Montello, and made a criminal complaint before a justice of the peace against her brother and his wife, residing in the town of Shields, for assault and battery; that it was necessary for her to remain there until the next day to attend the trial as a witness; that she had no means with which to pay for her food and lodging; and that the chairman of the board of supervisors of Shields procured the plaintiff to keep her at his hotel

McCaffrey vs. The Town of Shields.

under a promise that the town of Shields would pay him therefor, representing to him that the town was chargeable for her maintenance; also that another supervisor of Shields was present when such arrangement and promise were made. The plaintiff kept the said Caroline sixty days, and duly presented his bill therefor for \$60 to the town board of Shields. The board refused to allow the bill, and the plaintiff brought this action to recover for her board and keeping, claiming \$90 damages. The cause was tried in the circuit court; a judgment of nonsuit and for costs was rendered against the plaintiff; and he appealed from such judgment.

Geo. E. Sutherland, for the appellant.

For the respondent there was a brief by *S. A. Pease* and *Jackson & Thompson*, and oral argument by *Mr. Thompson*.

LYON, J. 1. The alleged pauper, Caroline Kooch, had no legal settlement in the town of Shields, or in any other town of this state. The learned circuit judge ordered a nonsuit on the ground that public charity did not become necessary in her case until she was in Montello, and that, although her residence was in Shields, that town was not liable under the statute, and no act or agreement of its supervisors could render it liable. The evidence in respect to the condition and situation of Caroline is somewhat meager and unsatisfactory, but we think it tends to show that she was a person of weak mind, that she had no money or property with which to support herself, and was scarcely able to maintain herself by her labor. She had evidently quarreled with her brother and his wife, against whom she preferred a criminal charge, and presumably was without a permanent home, and dependent to some extent upon the charity of strangers for shelter and perhaps for subsistence. We are of the opinion that the evidence was sufficient to send the question whether she was a pauper to the jury.

If she was a pauper immediately after her arrival at Mon-

McCaffrey vs. The Town of Shields.

tello, where she went to make the criminal complaint against her brother and his wife, she was a pauper when she left the defendant town, and in that town. The mere circumstance that the demands of nature did not require that she should have food, shelter and lodging until after she had passed beyond the limits of the defendant town, is of no importance. The conditions which made her a pauper (if she was one) existed as well before as after she went to Montello. It may be that, had application therefor been made to the proper authorities of Montello, it would have been their duty to relieve her. But this does not excuse the town from whence she came from relieving her, if that town is otherwise under obligation to do so. Her residence was in the town of Shields, and she went to Montello for a mere temporary purpose, with the evident intention of returning at once to Shields. It seems clear to us that if she was a pauper in Shields, and if it was the duty of that town to relieve her had she remained there, it is not released from that duty merely because the first necessity for actual relief chanced to arise during her temporary absence.

2. The defendant town cannot be held liable in this action in any event unless its supervisors, or at least two of them (R. S., p. 1145, sec. 4971, subd. 3), requested the plaintiff to board and lodge Caroline. The case of *Mappes v. Supervisors*, 47 Wis., 31, does not hold to the contrary. There a pauper who was a county charge had been removed from the poor-house, where she had been for several years, by order of a superintendent of the poor, and had been refused a home with her relatives. The plaintiff cared for and relieved her, not knowing she was a pauper. The circuit court held that he could recover for her support until he discovered she was a pauper, and until a reasonable time thereafter had elapsed to enable him to notify the county authorities that he was relieving her, and for no longer time. On the appeal of the county, this court affirmed a judgment for the plaintiff. It is manifest that the case furnishes no rule to govern the present case.

McCaffrey vs. The Town of Shields.

Without stating the testimony on the subject, we think it tends to show that the chairman of the board of supervisors of the town of Shields, with the implied assent of another supervisor of that town then present, requested the plaintiff to keep Caroline. If the proofs leave the matter in doubt, it is a proper question for the jury. We think it is no obstacle in the way of a recovery in this action, that the request was made in Montello and not in Shields. If it was the duty of the latter town to relieve Caroline, the supervisors could lawfully contract for her relief wherever she might be.

3. This brings us to consider and determine whether the statute made it the duty of the defendant town to relieve Caroline, if it be determined that she was a pauper. If no such obligation was imposed by the statute, the supervisors could not bind the town for her maintenance by any contract they might enter into in that behalf.

There is no evidence, and it is not claimed, that the distinction between town and county poor has been abolished in the county of Marquette, in which the town of Shields is situated. The county, therefore, is only liable for the support of such paupers therein who have no legal settlement in any town in this state. R. S., p. 460, sec. 1517. Each town is liable for the support of all paupers having a legal settlement therein. Section 1499. If the pauper becomes a charge upon any town other than that in which he has a legal settlement, the former town is primarily and the latter is ultimately chargeable for his support. Section 1513. Section 1512 provides that certain classes of paupers, for whose relief the county is ultimately chargeable, shall in the first instance be relieved by a town in certain contingencies. In this case Caroline, the alleged pauper, had not resided in Shields, or in any other town in this state, for one year; hence she had acquired no legal settlement in any town. Section 1500, subd. 4. She was therefore a county charge, if a pauper.

Section 1501 requires the supervisors to relieve all poor per-

McCaffrey vs. The Town of Shields.

sons in their town "so long as they remain a town charge," but does not define what classes of paupers shall be a town charge. To ascertain that we must look to other provisions. If the defendant town is liable in this action, it is so because Caroline is a pauper belonging to some class specified in section 1512, which the town must primarily relieve, having a remedy over against the county. Our inquiry must be, therefore, Assuming that she is a pauper, does she belong to a class specified in section 1512? The material portion of the section is as follows: "When any person not a resident, nor having a legal settlement therein, shall be taken sick, lame, or otherwise disabled, in any town, and shall not have money or property to pay his board, attendance and medical aid, the supervisors shall provide such assistance to such poor person as they may deem just and necessary, and if he shall die they shall give him a decent burial. They shall make such allowance for such board, nursing, medical aid and burial expenses as they shall deem just, and order the same to be paid out of the town treasury."

The portion of the section here quoted takes the place of section 20, ch. 34, R. S. 1858; but the phraseology of the latter section is somewhat changed. That section provided that, "when any non-resident stranger, or any other person, shall be taken sick, lame, or become otherwise disabled, in any town in this state, having no legal settlement therein," etc., continuing as in the revised section 1512. The original section includes a pauper, otherwise within its provisions, who is a resident of the town in which he becomes sick or disabled. But it is argued that the revised section, by reason of the omission therefrom of the words "or any other person," excludes a resident pauper, not having a legal settlement in such town, from the operation of the statute. This does not necessarily result from the language employed in the revised section. The section may reasonably be construed to include two classes of paupers: (1) Those who are not residents of the town, and

McCaffrey vs. The Town of Shields.

who presumably have no legal settlement therein; and (2) those who, although residents of the town, have no legal settlement therein. It may be true that, looking at the words alone, the more natural construction would be that contended for by the learned counsel for the defendant. But when the meaning is doubtful and the statute admits of construction, as does this statute, we must look further and ascertain if we can the sense in which the legislature used the words. When that is ascertained it controls the construction, provided no violence be done to the language of the statute.

If the construction contended for prevails, the second class above mentioned, to which the alleged pauper in this case belongs, if she is otherwise within the statute, will be entirely excluded, and the only source to which she can apply for relief is to the county authorities. The county board *may* make such rules and regulations as it may deem proper in relation to the support of poor persons whose maintenance is a county charge; it *may* buy or rent suitable lands and buildings, and maintain such poor persons on and in them; and it *may* appoint an agent to take charge of such land, buildings and poor persons. R. S., secs. 1517, 1518. But no law compels the county board to do any of these things. There is no suggestion in this case that the county board of Marquette county has ever done any of them. It results that there may be no opportunity to invoke the action of the county board for the relief of a pauper chargeable to the county, except during the brief annual meeting of the board, no matter how pressing the necessities of the case may be.

It was said by the present chief justice in *Mappes v. Supervisors, supra*, that the intent of these statutes is "to guard against the danger of any one unable to support himself being left without the very means of sustaining life." Undoubtedly this is true. But if the construction of section 1512 contended for should prevail, a very large class of paupers would be left in that unfortunate situation. Unless the statute is

McCaffrey vs. The Town of Shields.

construed to include them, those paupers who are residents of the town in which their disability happens, but having no legal settlement therein, might not be relieved until the aid of the county board could be invoked, no matter how urgent the case or how distant the time of the next meeting of the board. It is manifest that the legislature intended no such disastrous result. Moreover, the revisers' notes show that they did not intend by the change of phraseology to change the law as contained in the statute of 1858. For the reasons above suggested, it must be held that the class of paupers to which the alleged pauper in this case belongs (if she be a pauper)—that is, those who are residents of the town where the disability exists, but who have no legal settlement therein,—are within the provisions of the section, and should be relieved in the first instance by the town. .

The term "otherwise disabled," as used in section 1512, means bodily or mental disability to procure a livelihood. The testimony in this case, although conflicting, tends to show that Caroline is so disabled by reason of mental infirmity verging on imbecility. Whether such disability exists is a question of fact for the jury. If she was thus disabled before she went to Montello, the undisputed evidence proves that she was then a pauper; and if the chairman of the board of supervisors of the defendant town, in the presence of and with the assent, express or implied, of another supervisor of that town, and in behalf of the town, requested the plaintiff to keep such pauper, the town is liable in this action.

We do not determine the measure of damages in case the plaintiff recovers. Probably he should recover no more than he claimed of the town. Whether he can recover only for keeping Caroline one day, or for the whole sixty days, may depend upon his agreement or understanding with the supervisors, and their future course in relation to a removal of the alleged pauper.

By the Court.—The judgment of the circuit court must be reversed, and the cause will be remanded for a new trial.

Mehlhop vs. Pettibone and wife.

MEHLHOP VS. PETTIBONE and wife.

January 11—May 10, 1882.

CONFLICT OF LAWS. (1) *Deed of land, in one state, executed in another state by residents thereof.*

FRAUDULENT CONVEYANCE. (2-5) *Exchange of lands: Fraud of one party; remedy of his creditors.*

- [1. Whether, where land conveyed is in one state, and the deed is executed in another state, between residents thereof, its validity, so far as it depends upon the relation of the parties to each other (in this case as husband and wife), is to be determined by the law of the state of residence or that of the state in which the land lies, *quære*.]
2. To avoid a sale as in fraud of creditors, both parties to it must be connected with the fraudulent design.
3. Where lands are exchanged, and one of the deeds is adjudged void as to the grantor's creditors, this does not affect the validity of the other deed.
4. The defendant wife having conveyed her own land in Iowa (which was the homestead) to the defendant husband, by a valid deed, and taken from him in exchange a deed of Wisconsin land (whose value is not shown), and there being no evidence that she knew of her husband's insolvency or indebtedness, a judgment avoiding the deed to her, in favor of his creditors, is reversed for want of sufficient proof of fraud on her part.
- [5. Whether the value or proceeds of the Wisconsin land could be followed by the husband's creditors in a court of equity, and made a charge upon the Iowa lands, not considered.]

APPEAL from the Circuit Court for *Waukesha* County.

The defendant, *Bronson Pettibone*, being a merchant at Dubuque, Iowa, and indebted to the plaintiff, *Mehlhop*, in the sum of about \$1,500, and having an undivided two-thirds interest in 160 acres of land in *Waukesha* county, Wisconsin, conveyed the same to his wife, *Eveline*, March 29, 1879, and at the same time took from her a deed of the homestead in Dubuque, on which they then resided, and had resided for many years, and which was of the value of \$2,700. On the 10th of July, 1879, *Bronson Pettibone* made an assignment of all his property, both real and personal (except the homestead and the *Waukesha* lands so conveyed to his wife), for the

Mehlhop vs. Pettibone and wife.

benefit of his creditors. On July 21, 1879, the plaintiff brought suit against *Bronson Pettibone*, in the circuit court for Milwaukee county, upon the indebtedness above mentioned, and attached the Waukesha lands so conveyed to *Mrs. Pettibone*, and on October 10, 1879, recovered and docketed judgment therein for \$1,661.53; and, upon filing a transcript of said judgment with the clerk of the circuit court for Waukesha county, he had an execution issued thereon, and levied upon the land so conveyed to *Mrs. Pettibone*, as the property of *Bronson*; and thereupon he commenced this suit in aid of that execution, to have the deed from *Bronson Pettibone* to his wife set aside and declared fraudulent and void as against the plaintiff, and to have the judgment decreed to be a lien upon the lands, and to have the lands and the interest which *Bronson Pettibone* had therein prior to March 29, 1879, subjected to the payment of the judgment the same as though the deed to his wife had never been made. *Bronson* and *Eveline Pettibone* each separately answered; and, upon the trial, the court found the above facts, and that *Bronson Pettibone* was insolvent when he so conveyed to *Mrs. Pettibone*, and also when he made the assignment; that his object in making the conveyance was to place the lands beyond the reach of his creditors; that neither that conveyance nor the one from *Mrs. Pettibone* to him was made in pursuance or in execution of any agreement of exchange between them, but both were made by *Bronson Pettibone* for the purpose stated; and that *Mrs. Pettibone* joined therein at the simple request of her husband, and solely to comply with such request; and that the Iowa homestead (except a small portion thereof), was exempt from execution, and beyond the reach of *Bronson Pettibone's* creditors; that the conveyance from *Bronson Pettibone* to his wife was void as against the plaintiff; but that *Mrs. Pettibone* should be allowed an equitable lien thereon to the amount of \$500, in consideration of an equal value of land not exempt conveyed by her to her husband.

Mehlhop vs. Pettibone and wife.

From a judgment entered in accordance with this finding, the defendants appealed.

D. H. Sumner, for the appellants.

For the respondent there was a brief by *Jenkins, Elliott & Winkler*, and oral argument by *Mr. Winkler*.

The following opinion was filed February 7, 1882:

CASSIDAY, J. By the statute of Iowa, in evidence, a married woman may receive grants or gifts of property from her husband without the intervention of trustees, and may convey her interest in real estate the same as other persons. Sections 1192, 1207, Iowa Code. Section 2206 of their code also provides that "a conveyance, transfer or lien, executed by either husband or wife, to or in favor of the other, shall be valid to the same extent as between other persons." See *Blake v. Blake*, 7 Iowa, 46; *Shields v. Keys*, 24 Iowa, 298. Such being the law of that state, there can be no question but that *Mrs. Pettibone* had the legal capacity to convey the Dubuque lots to her husband. See *Jones v. Brandt*, 10 N. W. Rep., 854. By that conveyance she divested herself of all title in those lots, valued at \$2,700, and vested the same absolutely in her husband. This being so, there can be no question but that she absolutely parted with a full and adequate consideration for the Waukesha lands purporting to be conveyed to her by her husband. Did she get title thereto by that conveyance? The land was in Wisconsin. She and her husband, at the time of the conveyance, were domiciled in Iowa. The agreement for the exchange of lands, and the deeds, were made and delivered in Iowa. Is the giving and taking of the deed to the Waukesha lands to be governed by the law of Wisconsin or Iowa? If the law of Iowa is to control, then the statute of that state clothed her with the legal capacity to take title directly from her husband, and the same would be valid at law. Counsel for the appellant insists that, as all transactions took place in Iowa, the laws of that state must control in determining the

Mehlhop vs. Pettibone and wife.

validity of the acts of the parties, and several cases in this court are cited in support of the contention. None of the citations, however, seem to meet the question here presented. That question is, whether the laws of Iowa, removing the disability of husband and wife in regard to their making conveyances to each other valid at law, is limited to conveyances of lands in Iowa, or extends to any lands owned by either in any state. In other words, does the disability to contract with or convey directly from one to the other, imposed by the laws of some states upon its citizens, extend to those outside of its limits, whenever they attempt to convey lands within its limits? Is the capacity of the parties, as well as the formal execution and validity of the conveyance, to be governed by the law of the place where the land is situated? The question is an interesting one, but as it was not discussed, and its determination is not essential to this decision, we refrain from considering it at this time. The respondent's contention will appear in its most favorable light by assuming, for the purposes of this case, that the laws of Wisconsin must control. It has frequently been held by this court that a deed based upon an adequate consideration, directly from the husband to the wife, is good in equity. *Putnam v. Bicknell*, 18 Wis., 333; *Hannan v. Oxley*, 23 Wis., 519; *Beard v. Dedolph*, 29 Wis., 136; *Fenelon v. Hogoboom*, 31 Wis., 172; *Carpenter v. Tatro*, 36 Wis., 297; *Dayton v. Walsh*, 47 Wis., 118; *Horton v. Dewey*, 53 Wis., 410. There would seem to be no good reason why contracts, when *bona fide*, made for such conveyance, based upon a valuable and adequate consideration, should not be specifically enforced in equity. 1 Bish. L. M. W., § 719; *Livingston v. Livingston*, 2 Johns. Ch., 537; *Wolfe v. Ins. Co.*, 39 N. Y., 49; *Hunt v. Dupuy*, 11 B. Mon., 285.

In *Hannan v. Oxley*, *supra*, it was held that "such a deed cannot be impeached in equity, by heirs, on the ground that it was made in consideration of property of the wife which belonged in law to the husband." In *Beard v. Dedolph*, *supra*,

Mehlhop vs. Pettibone and wife.

this court went still further, and held that where a wife had a separate estate, and in exchange for a part of it took a note directly from her husband, and payable to him, she thereby, and as incident to her power to contract with reference to her own estate, acquired a good title to the note at law.

Fenelon v. Hogoboom, *supra*, was an action for unlawful conversion, but the chattel mortgage from the husband directly to the wife was held good at law. Whether the same rule would obtain in case of real property it seems unnecessary here to determine; for this is a bill in equity, and, the wife having parted with full consideration, the defense is certainly equitable, and must prevail unless the transaction was tainted with fraud. Can we say, upon the evidence before us, that such was the fact? Whatever may have been the rule at common law, the statute of this state makes the question of fraudulent intent in making such conveyances, "a question of fact, and not of law." Section 2323, R. S.

The burden of proving, as a matter of fact, that the conveyance was made with the intent to defraud creditors was upon the plaintiff. *Hyde v. Chapman*, 33 Wis., 392; *Barkow v. Sanger*, 47 Wis., 500; *Graham v. Railroad Co.*, 15 West. Jur., 69, and the numerous authorities cited in the note. Here there is no specific finding of fraudulent intent, but we think we are justified in finding such intent on the part of *Bronson Pettibone* as a fair inference from the evidence. But can we find such intent on the part of *Mrs. Pettibone*? The court finds that the exchange was made by the wife, "at the simple request of said *Bronson Pettibone*, solely to comply with such request." This finding goes to the full extent of the evidence. There is no evidence to show that the wife was aware of her husband's insolvency, or that he was in embarrassed circumstances, or even indebted to the plaintiff or any one at the time; but the contrary. It is true, she seems to have acquiesced in the exchange as he suggested. But she must have known that she was parting absolutely with all title

Mehlhop vs. Pettibone and wife.

to the Dubuque property, valued at \$2,700, and getting nothing in exchange but the Waukesha lands. There is nothing to show what the value of those lands was, but she had seen them, and we must presume that she had some notion of their value and was satisfied to make the exchange. Can we infer an intent to defraud upon her part from her passivity, and the mere fact that the transaction was between husband and wife?

We have recently held, in cases above cited, that such transactions should be subjected to close scrutiny, but we are unwilling to hold that they are presumptively fraudulent from the mere relation of the parties. In order to avoid a sale as being in fraud of creditors, both parties must be connected with the fraudulent design. *Sterling v. Ripley*, 3 Pinney, 155; *Hopkins v. Langton*, 30 Wis., 379. The same rule prevails in the courts of Iowa. *Fifield v. Gaston*, 12 Iowa, 218; *Steele v. Ward*, 25 Iowa, 535; *Preston v. Turner*, 36 Iowa, 671; *Drummond v. Couse*, 39 Iowa, 442; *Kellogg v. Aherin*, 48 Iowa, 299. The rule seems to be universal. *Leach v. Francis*, 41 Vt., 670; *Partelo v. Harris*, 26 Conn., 480; *Ewing v. Runkle*, 20 Ill., 448; *Violett v. Violett*, 2 Dana, 323; *Foster v. Hall*, 12 Pick., 89; *Bryne v. Becker*, 42 Mo., 264; *Bancroft v. Blizzard*, 13 Ohio, 30; *Splawn v. Martin*, 17 Ark., 146; *Governor v. Campbell*, 17 Ala., 566; *Ruhl v. Phillips*, 48 N. Y., 125; *Jaeger v. Kelley*, 52 N. Y., 274. It is thus established that before a conveyance, made by a grantor with the intent to defraud his creditors, will be set aside as against the grantee, it must be made to appear that such grantee participated in or had knowledge of such intent. The evidence here being insufficient to establish such knowledge or intent on the part of *Mrs. Pettibone*, and she having parted with full value in exchange for the deed of the Waukesha lands, there would seem to be no equitable grounds for setting the same aside. This is especially so, since it is well established that she could not reclaim the Dubuque lands conveyed to her husband; for, as between the parties, such conveyance was valid,

Mehlhop vs. Pettibone and wife.

even if they both intended to defraud the husband's creditors. *Jones v. Lake*, 2 Wis., 210; *Eaton v. White*, 2 Wis., 292; *La C. & M. Railroad Co. v. Seeger*, 4 Wis., 268; *Fargo v. Ladd*, 6 Wis., 106; *Schettler v. Brunette*, 7 Wis., 197; *Reynolds v. Vilas*, 8 Wis., 471; *Janvrin v. Maxwell*, 23 Wis., 51; *Clemens v. Clemens*, 28 Wis., 637; *Dietrich v. Koch*, 35 Wis., 618; *Gunderman v. Gunnison*, 39 Mich., 317. Whether the value or proceeds of the Waukesha lands could be followed by the plaintiff, in a court of equity, into and made a charge upon the Dubuque lands, is a question not before us for consideration.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded with directions to dismiss the complaint.

The respondent moved for a rehearing; and the following opinion was filed May 10, 1882:

CASSODAY, J. The statement of facts in this case was necessarily very brief, and merely indicated the view we took of the evidence in consultation, when both points urged for a rehearing were carefully considered, but perhaps not as clearly stated in the opinion as they should have been. The statement in the opinion that *Mrs. Pettibone* "parted with a full and adequate consideration," was perhaps in part an assumption. There may not have been a "full" consideration; but we thought then, and think now, that there was an "adequate consideration," or, at least, that the evidence failed to show that it was so grossly inadequate as to raise a presumption or inference of fraud on her part. It is to be remembered that there was no evidence as to the value of the Waukesha lands, and that the burden of proving fraud was on the plaintiff. It is true, as urged, that *Mrs. Pettibone* had no inchoate right of dower in the Waukesha lands, and that she did retain an inchoate right in the Dubuque lots while she and her husband continued

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

to occupy them as a homestead. But such occupancy was not necessarily permanent, and there was some evidence tending to show a purpose to move onto the Waukesha property. Of course a vendee is chargeable with such notice as the facts and circumstances within his or her knowledge necessarily imply; but, as stated in the opinion, "there is no evidence to show that the wife was aware of her husband's insolvency, or that he was in embarrassed circumstances, or even indebted to the plaintiff or to any one at the time; but the contrary." The only circumstance disclosed in the evidence tending to throw any suspicions on the transaction, so far as *Mrs. Pettibone* is concerned, is referred to in the opinion. From the evidence in the case there seems to be less reason for setting aside the conveyance to the wife here than in the recent case of *Pulte v. Geller*, where a conveyance to a wife was sustained against the husband's creditors by the supreme court of Michigan. 11 N. W. Rep., 385.

For these reasons the motion must be denied.

By the Court.—Motion denied.

THE BLACK RIVER IMPROVEMENT COMPANY VS. THE LA CROSSE
BOOMING & TRANSPORTATION COMPANY and others.

January 20 — May 10, 1882.

CORPORATIONS: NAVIGABLE RIVERS: RIPARIAN OWNERS. (1) *Plaintiff's powers under its charter.* (2) *Its right to take lands of state without compensation.* (3, 4) *Subsequent purchasers from state bound.* (5) *Rights of riparian proprietors as against the state or its agents.*

Plaintiff's charter empowers it "to improve the navigation of the Black River and lakes near the mouth" thereof, in counties named, "by removing obstructions, building dams, breaking jams, deepening, widening and straightening the channel, closing up chutes and side-cuts leading from said river into the Mississippi river, and into the bottom lands of said river, and into sloughs; to erect booms and piers, construct

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

levees and dykes, and repair and straighten the banks of said river," etc. It further declares that said charter "shall be deemed a public act, and its provisions shall be liberally and favorably construed." *Held*,

1. That plaintiff took power under such charter, for the purpose of improving the navigation of Black River, to close by a dam the entrance of Black Snake River, which diverges from the main channel of Black River and rejoins it at a lower point, such stream being in the nature of a slough, and the entrance thereto a chute or side-cut, within the meaning of the act; and this, although said Black Snake River was a navigable stream.

2. That said charter (which required compensation to be ascertained and paid for any lands taken from private owners, but contained no such provision in respect to lands belonging to the state), by implication authorized the plaintiff to take, for the purpose of improving the navigation of said river in the manner provided, any lands of the state without compensation.

3. That persons who purchased lands from the state *after* the erection of dams and embankments thereon by plaintiff, as authorized by the charter, took subject to plaintiff's right thus acquired.

4. That where such an embankment was made by plaintiff upon land held by contract of sale from the state, with the consent of the purchaser, and such land was afterwards forfeited to the state and resold, the subsequent purchaser took, subject to plaintiff's right.

5. That riparian owners on a navigable stream cannot recover damages for a diversion of the water by the state, or by a corporation acting by authority of the state, for the improvement of the navigation. *Arimond v. Green Bay & M. Canal Co.*, 31 Wis., 316, and *Delaplaine v. O. & N. W. Railway Co.*, 42 Wis., 230, distinguished.

APPEAL from the Circuit Court for *La Crosse* County.

The case is thus stated by Mr. Justice TAYLOR:

"The plaintiff and the principal defendant in this action are corporations; the first organized under a special law of the state, and the second under a general law — chapter 144, Laws of 1872. The action is brought for the purpose of restraining the defendant company and its officers and agents from interfering with the property and franchises of the plaintiff company.

"The plaintiff was incorporated and derives all its powers and franchises from chapter 84, P. & L. Laws of 1864, amended by chapter 447, P. & L. Laws of 1866. The powers

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

conferred upon it are declared in section 1 of said chapter 84, Laws of 1864. After giving the names of certain persons as corporators, the act declares, "that they shall be and are hereby created, in accordance with the provisions of this act, a body corporate and politic, by the name and style of the Black River Improvement Company, and by that name shall have succession and continue for twenty-five years, *and shall have power and authority*, and they are hereby authorized and empowered, to improve the navigation of the Black river, and lakes near the mouth of the same, in the counties of Clark, Jackson, Trempealeau and La Crosse, in the state of Wisconsin, *by removing obstructions, breaking jams, deepening, widening and straightening the channel, closing up chutes and side-cuts leading from said river into the Mississippi river and into the bottom lands of said river, and into sloughs; to erect booms and piers, to construct levees and dykes, and repair and straighten the banks of said Black river*, and to contract and be contracted with, sue and be sued, implead and be impleaded, in all courts of law and equity whatever, and make and have a common seal," etc. The amendment made to this charter by chapter 447, Laws of 1866, simply added the words "building dams" after the word "obstructions" in said section. The ninth section of the act gave the corporation the power to charge certain tolls upon logs, timber and lumber run on said river, after expending in such improvements certain sums of money mentioned therein.

"The defendant corporation was organized under chapter 144, Laws of 1872, and in the articles of association the powers of the corporation were stated as follows: 'For the purpose of manufacturing, by steam or water-power, within the county of La Crosse or elsewhere, lumber, lath, pickets, timber and all other products of wood material for market, and to purchase and sell timber, lumber, logs and all other wooden materials and products, and all such merchandise as may be necessary in such business; *and also of improving Black river and sloughs*

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

for navigation, from John Lytle's mill on said river to its mouth and entrance into the Mississippi river by way of the main river and Black Snake river and French slough, for the purpose of booming, driving, rafting, holding and manufacturing logs, timber and other wooden materials for the use of the company or of other persons, and to purchase and sell all such materials and real estate as said company may deem expedient; also of transporting property of all kinds on the Mississippi river and tributaries by vessels and water-craft, and to purchase and charter all necessary vessels for towing purposes, as common carriers or otherwise, upon the Mississippi river and its tributaries, and to charge a reasonable compensation therefor for all booming, rafting, manufacturing, transporting and towing or other services for other persons, and with power to construct such improvements in said streams by way of improving the navigation of the same, and such booms, piers, piles, assorting works, rafting works, holding grounds for materials, and purchasing and leasing such real estate as said company may need.'

"The principal controversy in this case grows out of the attempt of the defendant company to keep open what in their articles of association is called the Black Snake river, and to improve the same for purposes of navigation. The evidence shows that what is called the Black Snake river is, in the original plats of the United States survey, called the West Branch, and is in fact a part of the waters of the Black river. The water constituting the Black Snake leaves the channel of the Black river at a point below Lytle's mills, and runs to the west of the main channel of the Black river through low grounds for about two miles, and then empties into what is called Rice lake. The main channel bears to the east and empties into the same lake. From that lake to the Mississippi, in an ordinary stage of water, all the waters of the Black river flow in one stream to the Mississippi. The West Branch or Black Snake was returned as a meandered stream on the government surveys

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

from the point where it leaves the Black river to Rice lake, and in its original state it was useful for the purpose of running logs, as deep or deeper than the main channel, but not as wide and more tortuous in its course. The evidence in the case shows that the plaintiff corporation, as soon as organized, and before 1866, closed up the Black Snake river at its upper end, where it first leaves the Black river, for the purpose of turning its waters into the main channel, in order to increase the volume of water in that channel. It also shows that the west bank of the Black river, immediately above the point where the Black Snake departed from the main channel, was low, so that whenever there was any considerable rise of water in the river it overflowed that bank and passed off into the low lands between the river and the Mississippi, and did not return again into the Black river; and that the plaintiff corporation, in order to prevent this overflow and increase the volume and depth of water in the Black river, built a dyke or embankment on the west bank of Black river, from the mouth of the Black Snake north, for the distance of a half mile or more; and that this embankment was maintained by the plaintiff corporation, as well as the dam or obstruction which prevented the flow of water from the Black river into the Snake river, from the time they were built until after the organization of the defendant corporation in 1876. The evidence also shows that the defendant corporation, immediately after its incorporation, broke down the dyke of the plaintiff on the west bank of the river, near the place where the waters of the Black Snake left the main river, so as to permit the waters to flow into the Black Snake channel the same as it did before the plaintiff's improvements were made, and has since continued to keep open the breach in said dyke or embankment.

“In order to present the material questions in the case it will not be necessary to review the testimony to any extent, as the findings of fact and the conclusions of law drawn therefrom by the learned circuit judge present the real questions con-

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

cerning which there is any dispute. The findings of fact are very full, and as to the material matters there is no great dispute as to their general accuracy. If the learned circuit judge has erred in the matter, the error is in the conclusions of law which he draws from such facts. We will therefore omit from this opinion the findings of fact, and insert merely the conclusions of law as the basis of our views in examining the correctness of the conclusions arrived at by the learned circuit judge. The following are the conclusions of law as declared by the circuit judge:

“(1) That the channel called Black Snake is a part of Black river, and is a public highway.

“(2) That the plaintiff's charter did not authorize the plaintiff to close up Black Snake channel, so as to destroy its navigability, nor so as to prevent its use by the public as a highway.

“(3) That the owners of the Black Snake channel have, as an incident to such ownership, the right to have the waters of Black river flow past their land as it was accustomed to flow, the right of access to the navigable waters of Black river from their own banks, and the right to land their own logs and property from the navigable waters of the river upon their own banks. The plaintiff has not and had not the right to close up the Black Snake channel, nor to prevent the natural flow of the water therein, so as to destroy the rights of riparian owners upon that channel; nor to erect or maintain levees or embankments on the banks of Black river, without making compensation to the riparian owners.

“(4) That the plaintiff's proceedings for the condemnation of several tracts of land, as described and set forth in the complaint, were abandoned, and gave the plaintiff no right in such lands.

“(5) That there is nothing in plaintiff's charter which forbids the riparian owners upon the Black river, or upon any of its navigable channels, the right to maintain in the

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

stream, in front of their own banks, suitable booms, piers, assorting and rafting works, in aid of the navigation of the stream with logs, at their peril only of obstructing navigation. The construction of such works by riparian owners is not an invasion of the plaintiff's rights under its charter.

“(6) That the defendant the *La Crosse Booming & Transportation Company*, being the owner of both banks of the Black Snake channel, had and has the right to maintain in front of its banks on that channel, in aid of the navigation of the Black river with logs, suitable booms, piers and rafting works, and the right to float its logs into and along that channel to its booms and rafting works. In the lawful exercise of those rights it might lawfully remove the obstructions placed there by the plaintiff, without lawful right, which prevented such use of the channel.

“(7) That it does not prejudice the plaintiff that the defendant cut the embankment at a place other than the meandered channel.

“(8) That the defendant the *La Crosse Booming & Transportation Company* may lawfully, as against the plaintiff, maintain and operate in the Black river, in front of its own banks, suitable and sufficient assorting works to enable it to separate its own logs from the logs of other owners.

“(9) That the plaintiff, being neither the owner nor driver of logs, is not injured by the detention of logs occasioned by the maintenance and operation of defendant's assorting works. If such works are or should become an obstruction to the navigation of the river with logs, that fact gives the plaintiff no right of private action.

“(10) That although the low land or depression between Rice lake and French lake is not a natural water-course between the two lakes named, yet it is not unlawful, as against the plaintiff, for the defendant to run its rafts of logs from its rafting works in the Black Snake channel to the Mississippi river by that route.

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

“(11) That the plaintiff has no cause of action against the defendants, and the complaint should be dismissed, with costs to the defendants.’”

From a judgment in accordance with this decision, the plaintiff appealed.

For the appellant there were briefs by *Burton & Woodward*, with *Gregory & Gregory*, of counsel, and by *S. U. Pinney* of counsel, and oral arguments by *Mr. Pinney* and *J. C. Gregory*.

For the respondents there were briefs by *M. P. Wing* and *G. C. Prentiss*, with *G. W. Cate*, of counsel, and oral argument by *Mr. Prentiss*. Among other things, they contended that, in the absence of a specific grant of power to close up the navigable waters of the state, the general policy of the law in regard to these waters should control, especially in cases of doubtful construction. Unless such power has been granted in unmistakable terms, it will be held not to exist. See *R. S.*, sec. 1777; *Enos v. Hamilton*, 24 Wis., 661; 37 id., 446; 41 id., 584; 3 Blackf., 193; 6 McLean, 237, 207. Even if its charter be construed to authorize the permanent closing up of the west branch of the river, the plaintiff could not do so without making compensation to the riparian proprietors. Every man purchasing or occupying lands on the navigable waters of the state, purchases and occupies subject to the superior right of the state to improve such rivers and regulate the flow of the water in the interest of the public; and therefore, for any occupation of the stream within the banks by the public for the public use, the shore owners have no right to claim compensation. But the improvement of a river, and its use and appropriation for purposes of navigation by the public, are one thing, and its permanent destruction by damming the water out of it is another. *Pumpelly v. G. B. Co.*, 13 Wall., 166; *Gardner v. Newburg*, 2 Johns. Ch., 162; 2 McLean, 378-382; *Arimond v. G. B. & M. Canal Co.*, 31 Wis., 316; *Chapman v. O. & M. R. R. Co.*, 33 id., 629; *Del*

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

aplaine v. C. & N. W. R. W. Co., 42 id. 214. In this case the plaintiff not only deprived the riparian owners on the west branch of all uses of the water of the stream, but actually constructed the dam for that purpose on their lands without any compensation. Such appropriation of the river and of the lands necessary to the dam was without authority of law, and the defendants had the right to remove the dam.

The following opinion was filed February 7, 1882.

TAYLOR, J. It will be seen by the conclusions of law above recited, as well as from the very able opinion of the learned circuit judge, which he filed upon the determination of this case, and especially by a subsequent opinion delivered by him in the case of the *Black River Flcoding Dam Association v. Ketchum*, ante, p. 313, that the learned judge held that the right of the appellant corporation, under its charter to improve the navigation of the Black river within the limits prescribed by the charter, in the manner and by the methods designated therein, were not repealed by the enactment of chapter 144, Laws of 1872, under which the defendant's incorporation was perfected, nor by the similar provisions of law reenacted in the Revised Statutes of 1878; and that no association or corporation formed under chapter 144, Laws of 1872, as amended by chapter 399, Laws of 1876, or by section 1777, R. S. 1878, was authorized to interfere with any works of the appellant, lawfully constructed under its charter, for the improvement of said river, or to make any improvements in said river within the limits prescribed in the appellant's charter, of a like character to those authorized by that charter. The learned judge held, as we understand from said opinion, that within the limits of the appellant's charter the right to improve the navigation of the Black river in the manner and by the means designated therein was exclusive, and that no other company or corporation organized under said general laws would have the right to make improvements of a similar kind

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

and charge any tolls for the use of such improvements during the continuance of the appellant's charter, or until the same was revoked by the legislature, or the franchises were declared forfeited by a court of competent jurisdiction. In respect to this part of the decision of the learned circuit court, certainly the appellant has no reason to complain; and, as it does not appear that any exceptions were taken by the defendant corporation, either to the findings of fact or conclusions of law, so far as the matters above stated are concerned, they must be taken as the law of the case upon this appeal.

The material questions arising upon the findings in this case are two: *First*. Had the appellant the right, under its charter, to close up the Black Snake for the purpose of turning its waters into the main channel, in order to improve the navigation of that channel? *Second*. Was it lawful for the corporation to close the Black Snake channel for such purpose, without first making compensation to the riparian owners along the line of the Black Snake for any injury they might sustain by the diversion of its waters from its natural course into the main channel?

The other questions, as to the right of the riparian owners on the Black river to maintain in front of their lands booms and piers, assorting and rafting works, not obstructing navigation thereby, or interfering with the appellant's improvements, need not be discussed or determined in this opinion. The learned circuit judge determined both of the questions above stated in the negative, and, as we understand it, determined the case against the appellant because its acts in these respects were void, and the appellant had no ground for complaint by reason of the acts of the defendant corporation, because such acts were lawful.

Upon the first point the learned circuit judge determined that under the provisions of the appellant's charter it had no right to close up the Black Snake or West Branch, because it was a navigable stream when and before the charter was granted

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

to the appellant, and that it does not come within the language of the act. The language of the act is: "They shall have power, and they are hereby authorized and empowered, to improve the navigation of the Black river, and the lakes near the mouth of the same, . . . by removing obstructions, building dams, breaking jams, deepening, widening and straightening the channel, closing up chutes and side-cuts leading from said river into the Mississippi river and into the bottom lands of said river and into sloughs, to erect booms and piers, to construct levees and dykes, and repair and straighten the banks of said Black river." It is said that, strictly construed, these words do not authorize the closing up of the Black Snake, because it is neither a chute nor side-cut leading from said river into the Mississippi river, or into the bottom lands of said river, or into a slough. It will be seen that there is no prohibition, in the words granting the power to close up chutes and side-cuts, against closing up navigable chutes and side-cuts. There can be no inference, therefore, drawn from the words used, that it was not the intention of the legislature to grant the power of closing up navigable waters of the kind specified, if it became necessary to do so in order to make improvements in the navigation of the Black river, which was the purpose of the grant of power. The evidence, in fact, shows that there were chutes and side-cuts which were sometimes navigable for running and rafting logs in the vicinity of the Black Snake, which came clearly within the terms of the charter, and which might therefore be closed under the power granted. It is possible that, within the rules of law which require a strict construction of the language conferring powers upon corporations, the Black Snake might not be included within the grant of power. But it is evident the legislature did not intend that this rule should apply to this charter, because in section 14 it is declared that the act "shall be deemed a public act, and its provisions shall be liberally and favorably construed." These words evidently mean that it shall be liberally and favorably

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

construed for the accomplishment of the purposes of the act, viz., the improvement of the navigation of the river. The provision of the act authorizing the building of levees, dykes and dams clearly indicates that one of the proposed methods for improving the navigation of the river was by confining the channel where it had a tendency to spread out into a shallow stream so as to be incapable of floating logs and timber; and the authority to close side-cuts and chutes was evidently for the same purpose, as well as for the purpose of preventing the logs and timber leaving the channel in high water and floating off into the low grounds and timber lands adjoining the west bank, and between that and the Mississippi river. The twenty-third finding of fact shows the character of the land between the west bank of the Black river and along the Mississippi river; and the twenty-ninth finding of fact shows "that in times of low water in the Black river there is not sufficient water to navigate both the Black Snake and the east channel fully; but that the said Black river is ordinarily subject to periodical rises, attributable to natural causes, occurring annually, and during such periods of high water both the Black Snake and the east channel are fully navigable for rafts and logs." How long this high water continues in each year, when both channels can be navigated, is not found by the learned judge.

Although there is no finding upon that subject, the evidence shows that what is called the Black Snake was a narrow stream compared with the main river, but deeper than the main channel in most of its course; that it ran through low ground, its course was crooked, and in high water it would spread out so as to make it difficult to tell where the channel was. One witness for the defendant says that where the Snake left the main river it was about 60 or 70 feet wide, and the main river about 150 feet wide. Other evidence shows that the average width of the Black Snake was about 70 feet, and that of the main channel about 140 feet. The evidence also shows that for some

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

distance above where the waters of the Black Snake left the main channel, the west bank was low, so that, when there was any considerable rise in the waters of the river, it overflowed that bank and passed into the Black Snake, and into the low grounds adjoining it. One of the defendant's witnesses, Mr. Robert Douglass, testifies that in an early day, when he passed up the Black Snake, there were three openings from that river into the main river; that they were deep enough to float a canoe, but not deep enough to float a raft; and that the three came together and made the Snake about thirty or forty rods from the place where they left the main river; and that, in order to get from the Snake to the river, they had to cut away the trees which hung over the opening. It will also be seen from an examination of the testimony, that very many of the witnesses call the openings from the river, through which the waters flowed to form the Snake, "chutes." The witness Douglass says there were three "chutes" there coming out of the Black river, which, uniting, formed the Snake. The other witnesses apply this same term to these openings. It would seem, from all the evidence in the case, that the waters which formed the Black Snake escaped over the low banks on the west side of the Black river in high water, and formed channels which in low water were shallow where they left the river; and that, after flowing a short distance, they united in low ground and formed the channel of that river; that they followed in this channel down to Rice lake, in which the main channel of the Black river also flowed; and that from there the waters of both streams again united, and flowed by one channel to the Mississippi through dry ground.

We think the evidence also shows that the closing of the Black Snake was a reasonable means of improving the navigation of the main channel. The power given the appellant corporation to build levees, dykes and dams, shows very clearly that the act contemplated the use of these levees, dykes and dams for the purpose of confining the waters of the river within

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

the channel, and preventing its overflow and spread into the low grounds along its shores, so that the logs and timber coming down the same should be prevented from floating off into the grounds adjacent, and be with more certainty confined within the banks of the river, and so safely floated to its junction with the Mississippi. A reasonably liberal interpretation of the words "chutes" and "side-cuts" would include the openings from the main river into the Black Snake, and if it be objected that these chutes or side-cuts did not lead the waters from the Black river into the Mississippi, still we think it is not straining the meaning of the act to say that the chutes or side-cuts from the Black river to the Snake river lead the waters of said Black river into the bottom lands of said river and into sloughs. From the nature of said Snake river, and the grounds through which it passes, and because it again returns into and mingles its waters with the main river, it might well be termed a slough within the meaning of said act, although, perhaps, not strictly a slough according to the definition of lexicographers. But as the work "chute" has come to mean in the common language of our river men any opening in the banks of a stream where a part of its waters diverge from the main stream, irrespective of the question whether it flows out with a rapid or slow current, so where a part of the waters of a stream in its downward course diverges from the main channel, and returns to it lower down, it is usually called a slough, and especially if in its separate course it runs with a slow current and through low grounds. It was said by the late learned Chief Justice RYAN, in his opinion in the case of the *Stevens Point Boom Co. v. Reilly*, 44 Wis., 302, that "in rivers like the Wisconsin it may not be always easy to determine which is the main channel and which is the slough. And, indeed, the natural action of the waters of the river may, from time to time, alter the character of its channels, making what was before a slough the main channel, and what was before the main channel a slough." In using this language he used

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

the word "slough" as including a side-cut like the one in question in this case; and he clearly understood the word "slough" to mean a channel diverging from the main channel, and returning into it again at a lower point, making the word "slough" include such side-cut, irrespective of the character of the ground through which it passed, or the velocity of its current. We know, as matter of history, that streams diverging from the main stream, whether returning into it again or forming a distinct outlet for the waters of a river into some other body of water, are called sloughs, even though navigable for steamboats. There are two or more such sloughs at the mouth of the Chippewa river, which have become somewhat noted in the courts of this state as well as of the United States. We are clearly of the opinion that a fair and just construction of the appellant's charter gave the corporation the right to close the entrance to what is termed Black Snake river. It was nothing more than closing up the chutes and side-cuts which lead the waters of the Black river into the bottom lands and sloughs adjoining the same.

The learned circuit judge before whom this case was tried, seemed inclined to hold that the language of the statute did not give the right to close the Black Snake, because it was a navigable stream, and not covered by the words "chutes or side-cuts leading," etc. We think in so holding he gave too strict a construction to the powers of the corporation.

The learned judge further held that if the charter did grant the power to close up the same, the plaintiff had no right to do so without first making compensation to the riparian owners along the banks of the Black Snake river, nor to maintain levees or embankments on the banks of the Black river without making compensation to the riparian owners. In his third conclusion of law he says: "The owners of the Black Snake channel have, as an incident to such ownership, the right to have the waters of Black river flow past their land as it was accustomed to flow, the right of access to the navigable

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

waters of the Black river from their own banks, and the right to land their own logs and property from the navigable waters of the river upon their own banks. The plaintiff has not and had not the right to close up the Black Snake channel, nor to prevent the natural flow of the water therein, so as to destroy the rights of riparian owners upon that channel; nor to erect or maintain levees or embankments on the banks of Black river without making compensation to the riparian owners." And because it was not claimed by the plaintiff that it had made any compensation to the owners of the land along the Black Snake, or to the owners of the shore of the Black river where it maintained its dyke or levee, he held that the defendant corporation had the right to remove such dyke or levee in order to turn the waters of the Black river into the Black Snake channel to the same extent that they ran through said channel before the plaintiff's levee and embankment were made.

The place where the levee or embankment was opened by the defendant corporation, was on lot 6 or 7, section 22, town 17 N., range 8 W. The learned circuit judge, in his findings of fact, does not determine upon which lot the levee or embankment was opened by the defendant; and from the evidence returned it is difficult to determine whether it was on lot 6 or 7 of said section; and for the purpose of this action it is not material upon which of the two it was made. Lot 6 was, at the time the embankment or levee was made, swamp land, and was owned by the state down to the year 1875; and lot 7 had then been contracted to be sold to one McMillan, who continued to own and possess the same until 1874, but was afterwards forfeited to the state, and the state again sold said lot, January 22, 1875, to Benjamin E. Edwards, and Edwards conveyed the same to the defendant *Polleys*. And the circuit judge finds that the plaintiff erected and maintained the embankment and dyke on said lot 7 with the full knowledge and consent of the owner, McMillan, from the time the

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

same was built down to the year 1874, when it was forfeited to the state.

The learned circuit judge seems to place the right of the defendant company to remove the embankment upon two grounds: *first*, upon the fact that said company was the owner of the lands upon which it was situate at the time the embankment was removed, and because it was placed there without making compensation to it as the present owner, and because no compensation had been made to the state under whom said company claims title; and *second*, because that company was the owner of the banks along the Black Snake, and as such owner had the right to have the waters of Black river flow into its old channel as it was accustomed to do before the appellant company closed the mouth of the same, and, because no compensation had been made to it or its grantees by the plaintiff, it had the right to remove the obstructions placed by the plaintiff in the river to prevent such flow, whether such obstructions were on the defendant's land or not.

Upon the first point we are of the opinion that any embankment which was made by the plaintiff, under its charter, on lands then owned by the state, adjoining the Black river, in order to confine its waters, were lawfully made without making any compensation to the state. The charter granted by the state, giving the corporation the power to build and maintain levees and embankments along the shores of the Black river in order to improve the navigation of the same, by necessary implication, gave the corporation the right to use for that purpose any lands owned by the state which were located upon the shores of said river. And as to lands upon which such embankments were made while the title remained in the state, the purchaser thereof from the state by a subsequent conveyance would take the same subject to the right in the plaintiff to maintain such embankments upon such lands. In construing the act of incorporation, we are bound to take into consideration the situation of things at the time the grant was made,

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

as well as the purposes of the grant. At the time the charter was granted to the plaintiff, the lands along the river where it would be necessary to make embankments and levees were, to a great extent, owned by the state; and as there were no means provided by the charter by which the corporation could acquire the right to make such embankments or levees upon the state lands by making compensation to the state, while the charter contained provisions for acquiring the right from private owners, although such provisions may have been sufficient to accomplish that purpose, it would seem to be a fair inference that the legislature intended to grant the right of such use to the corporation without compensation as to all lands owned by it which it would become necessary to use in executing the purposes of the grant.

It has been held by other courts, and such appears to be the settled construction, that when the legislature authorizes a public highway, or other public improvement of a like nature, by a corporation, the making of which will necessarily require the use or taking of the public lands, and no negative words are contained in the charter, and no provision made for making compensation to the state for public lands so required to be taken, the right to use or take the same for such purpose is conferred upon the corporation without making compensation therefor. This construction of the plaintiff's charter is very strongly supported by the following cases cited by the learned counsel for the appellant: *Ind. C. Railroad Co. v. State*, 3 Ind., 421; *Pa. Railroad Co. v. Railroad Co.*, 8 C. E. Green (Ch.), 157; *Davis v. E. T. & Ga. Railroad Co.*, 1 Sneed, 94; *United States v. Railroad Bridge Co.*, 6 McLean, 517. And while we are unwilling to commit ourselves to the full extent of the doctrine as laid down in the first case above cited, we are clearly of the opinion that the doctrine should be applied to this case to the extent of holding that, as to all lands owned by the state on the margin of the Black river at the time of making the improvements by the plaintiff, it had

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

the right to use such state lands as were necessary to make levees and embankments to accomplish the purposes of the charter, without making compensation therefor; and further, that as to the state it had the right to close up any chutes or side-cuts, for the purposes of such improvement, whether such chutes or side-cuts were navigable or otherwise; and that if the state had any riparian rights as owner of the lands on the banks of such chutes or side-cuts, the corporation had the right, without making compensation, to destroy such rights, so far as the closing up of said chutes and side-cuts would destroy them; and that all subsequent purchasers from the state would take subject to such right of the plaintiff. As having some weight in the determination of this question, we may be permitted to take into consideration the general policy of the state upon questions of a similar character. No case can probably be found where any compensation was required to be paid to the state for the opening of ordinary public highways through lands owned by the state; and, in relation to the construction of railroads, as early as 1857 the legislature passed an act giving a right of way, without compensation, through the university, school, swamp and overflowed lands of the state, one hundred feet in width, to every railroad thereafter constructed in this state. Chapter 9, Laws of 1857; chapter 79, R. S. 1858; section 1270, R. S. 1878. We are inclined to hold that the levees and embankments made by the plaintiff along the margin of Black river upon lands owned by the state at the time the same were made, were lawfully made without making any compensation to the state or to the subsequent purchasers from the state. The levee or embankment made upon lot 7 was made with the consent of the then owner, who held a contract from the state, and, so far as the state retained the title, with its consent; and, the purchaser having afterwards forfeited his right to the land, and the state again becoming the absolute owner, its subsequent grantee must take the same subject to the right of the

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

plaintiff to maintain said levee or embankment. Under the decisions of this court, when the purchaser, McMillan, failed to pay the interest on his certificate of purchase of lot 7, the right of the state became as perfect as though no sale had ever been made, and the title of the state was the same as though no certificate had ever been issued. *Conklin v. Hawthorn*, 29 Wis., 476, 480; *Smith v. Mariner*, 5 Wis., 578. In this view of the case the defendants had no right to interfere with the levees or embankments of the plaintiffs on any lands which were owned by the state at the time the same were made.

The only other ground of justification of defendants' acts is based upon the other alleged fact, that, as owners of lands on the margin of the Black Snake river, they had a right to have the waters of said river flow past their lands as it was accustomed to do before the entrance of said river was obstructed by the plaintiff, unless compensation was first made to them for obstructing the flow in said river. As to those lands which the defendants purchased from the state on the margin of the Black Snake after the waters of said stream had been obstructed by the plaintiff, they were not entitled to any compensation for the obstruction of such flow. The state having authorized such obstruction, and having made no provision that the corporation should make the state any compensation on account thereof, none can be claimed by the state, nor by its grantees subsequent to the time when such obstructions were made.

The findings of fact do not show that the defendants, or any of them, are now, or were at the time of the acts complained of by the plaintiff, the owners of any lands on the shores of the Black Snake, the title to which was not in the state of Wisconsin at the time the obstructions were made which prevent the flow of the waters of the Black river into the same. And, after an examination of the record, we are unable to say with any certainty that they were or are now the owners of any lands on said Black Snake which were not owned by the state

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

at that time, except lot 8, in section 22, town 17, range 8 W. This lot 8 is a very small parcel of land at the point where, according to the government survey, the waters of the Black river were diverted into what is now called the Black Snake. This tract of land contains but a very few acres, and lies between the main river and the Black Snake, so that the owner thereof can have access to the waters of the main channel without passing up the Black Snake. But as we may be mistaken upon this question of fact, and the defendants may be the owners of lands on the banks of the Black Snake between the place where its waters leave the main channel and Rice lake, the title to which was not in the state at the time the obstructions were made by the plaintiff, it becomes necessary for us to inquire whether the ownership of such property by the defendants would justify them in removing the plaintiff's levee or embankment for the purpose of restoring the accustomed flow of water in the old channel of the Black Snake through or in front of the lands so owned by the defendants.

The learned circuit judge held that, unless the plaintiff had made compensation for any damage resulting to such riparian owners, its acts as to them were unlawful, and they were at liberty to right themselves by destroying so much of its works as might be necessary to restore the flow of the waters in the Black Snake as the same were accustomed to flow before the plaintiff's obstructions were put in the river. Admitting such ownership on the part of the defendants, it is contended by the learned counsel for the plaintiff, that as such owners they have no such vested right to the waters flowing in said Black Snake as will prevent the state, or the plaintiff acting in behalf of the state, from diverting such waters from that channel, if it becomes necessary or convenient to do so in order to improve the navigation of the main channel of the river. It is claimed that the riparian owner on a navigable stream has no right as against the public, or persons or corporations acting in behalf of the public, making improvements of such

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

navigable stream, to have the waters of such stream flow in their accustomed course in front of his lands; and this contention on the part of the learned counsel for the appellant is, we think, sustained by the most learned courts of this country, and that doctrine has been quite clearly sanctioned by several decisions of this court. *Canal Appraisers v. The People*, 17 Wend., 571; *People v. Canal Appraisers*, 33 N. Y., 461, 500. These cases were thoroughly discussed by learned counsel, and the opinions delivered were learned and exhaustive of the subject, and in both cases it was held "that riparian owners along a navigable stream are not entitled to damages for any diversion or use of the waters by the state." In these cases the waters were not diverted in order to improve the navigation of the same stream, but to supply the Erie canal, an artificial water-course constructed by the state. *Lansing v. Smith*, 8 Cow., 146, and many other cases in that state, are to the same effect.

In *Hollister v. Union Co.*, 9 Conn., 436, it was held that as to navigable rivers the state, holding the river for that purpose, may do everything for the full enjoyment of such right not inconsistent with the great constitutional provision that "private property shall not be taken for public use without just compensation;" and that consequently the placing of piers and other obstructions in the river in good faith, by a company authorized by the state to improve the navigation of such river, by means of which the water within the banks of the river was raised and the current thereof changed opposite the plaintiff's land, by reason whereof his bank was undermined and washed away, did not give any cause of action against the company.

In *McKeen v. Delaware Division Canal Co.*, 49 Pa. St., 424, it is held that "every one who buys property upon a navigable stream purchases subject to the superior rights of the commonwealth to regulate and improve it for the benefit of all her citizens. If, therefore, he chooses to place his mills or

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

his works, for the qualified use he may make of the water, within the limits or influence of high water, he does so at his own risk, and cannot complain when the commonwealth, for the purpose of improvement, chooses to maintain the waters of the stream at a given height within its channel." The same doctrine of the right of the state to control the navigable waters of the state, without liability for damages, is held in the following cases in that state: *Monongahela Navigation Co. v. Coons*, 6 W. & S., 101; *Susquehanna Canal Co. v. Wright*, 9 W. & S., 9; *Monongahela Bridge Co. v. Kirk*, 46 Pa. St., 112; and many other decisions of the courts of that state hold the same doctrine.

In the case of *Fitchburg Railroad Co. v. Railroad Co.*, 3 Cush., 58-88, Chief Justice SHAW says: "It is incident to the power of the legislature to regulate a navigable stream so as best to promote the public convenience; and if, in doing so, some damage is done to riparian proprietors, and some increased expense thrown upon them, it is *damnum absque injuria*." See also *Rundle v. Delaware & Raritan Canal Co.*, 14 How. (U. S.), 80; *Willson v. Black Bird Creek Marsh Co.*, 2 Pet., 250; *Transportation Co. v. Chicago*, 9 Otto (U. S.), 635; *Pumpelly v. Green Bay Co.*, 13 Wall., 166, 181; *Fay v. Aqueduct Co.*, 111 Mass., 27; *Com'rs Homochitto River v. Withers*, 29 Miss., 21; *Treat v. Lord*, 42 Me., 552. These cases and many others hold the doctrine that the waters in a navigable river, or other navigable body of water, are so far the property of the state that the state may control them for public purposes, in their flow or otherwise, without making any compensation to the riparian owners upon the borders of such streams or bodies of water. The flowing waters in such streams are public highways, and such water-ways are as much subject to the control of the state for the purposes of the improvement of such ways, as a highway upon the land. The right of the public to raise or lower the grading of a public street without being required to compensate the ad-

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

jacent owners is well established by the decisions of this court (*Dore v. City of Milwaukee*, 42 Wis., 108; *Harrison v. Bd. of Sup'rs of Milwaukee Co.*, 51 Wis., 645); and the right to discontinue a highway without making compensation has always been recognized by the law. The right of the riparian owner to have the water of a navigable stream flow past his lands adjoining the same as they were accustomed to flow, is as perfect against everybody except the state, or some person or corporation standing in its stead, as it is in the case of unnavigable streams; and that right does not, as this court has decided, depend upon his ownership of the soil under the water, but upon his riparian ownership (*Cohn v. Wausau Boom Co.*, 47 Wis., 314, 322); and the right of the state to control the waters of such streams in the public interest is the same whether the ownership of the soil under the water be in the state or in the riparian owner.

The doctrine of the cases above cited has, as we think, been fully adopted by this court in all cases where the interference with the waters of a navigable stream has been for the improvement of the navigation thereof. Whether this court has decided or will decide that the state may, for any and all public purposes, interfere with the waters of a navigable stream, whereby injury may result to the riparian owner, without making compensation therefor, need not be determined in this case. The plaintiff represents the state for the purpose of improving the navigation of the Black river, and that which it has done under its charter, which is complained of by the defendants, we think must be, for the purposes of this action, considered to have been done for the improvement of navigation in said river. And, as against the state, or the plaintiff acting in its stead, we think this court has determined that the riparian owners on the banks of the Black river, or the Black Snake river, have not the absolute right to have the waters of said river flow as they were accustomed to flow in front of or through their lands. See *Wisconsin River Imp. Co.*

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

v. Lyons, 30 Wis., 61-65; *Cohn v. Wausau Boom Co.*, *supra*; *Stevens Point Boom Co. v. Reilly*, 46 Wis., 237. In the cases last cited, the rights of a riparian owner upon a navigable stream, and the power of the state to restrict, limit or take away such rights, were fully discussed; and this court, after mature deliberation, came to the conclusion that these rights are the subject of legislative control without making compensation, where they are taken for the purpose of improving the navigation of such stream.

In the case of *Cohn v. Wausau Boom Co.*, *supra*, the plaintiff brought an action to enjoin the defendant company from completing its works as authorized by its charter, upon the ground that he was a riparian owner of land upon such river, which he had bought for the purpose of building thereon a saw-mill; that in the natural flow of the water in front of his lands he could, by the use of booms and other appliances, stop the logs coming down said river and hold them for the purpose of being manufactured in his mill; that he was the owner of large tracts of pine land above said point, and that by reason of the structure already completed, and others which the defendants threatened to construct in the river and in front of his land, the channel of the river had been shifted from its natural place, the current in front thereof greatly increased, and the water made to flow with great velocity, so as to form the main channel of the river; and that by reason thereof the approach to the plaintiff's land had been rendered inaccessible for logs and lumber, all connection with the center of the stream cut off, and the fitness of the land for booming and mill purposes destroyed.

In the opinion delivered in that case by the late Chief Justice RYAN, he says: "The appellant must therefore be held to be a *quasi* public corporation, an agent of the state for the improvement of the river, and its franchises granted for a public use. Of course, private property of others could not be in any way appropriated or used by the appellant in aid of the

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

public purpose without authority of law, upon just compensation. But the land of the respondent is neither taken nor used; the works of the appellant neither touch it nor overflow it. The statutes under which the appellant acts authorize no such interference with the property of others. They only aid the public use for which the appellant is chartered, by restraining the exercise of a private right which the legislature appears to have considered inconsistent with it; a right which the respondent, as other riparian owners, held only by implied public license — as it were, as tenant by sufferance of the state; a right of which the exercise might always be prohibited by public law in aid of public use. The private right is a *quasi* intrusion upon the public right, tolerated only in private aid of navigation, and gives way *ex necessitate rei* to public measures in aid of navigation." The learned chief justice then quotes the following language from his opinion delivered in the case of *Stevens Point Boom Co. v. Reilly*, 46 Wis., 237: " 'This private right of the riparian owner is subordinate to the public use of a navigable river, and is always exercised at peril of obstructing navigation. This subjection of the private right to the public use may sometimes impair the private right or defeat it altogether. But the public right must always prevail over the private exercise of the private right.' As against the riparian owners, within the limits specified in the statute, the state has only resumed its own. Otherwise, the title, possession and use of the respondent's land remain intact. If the public action lessen its value, it is literally *damnum absque injuria*."

It will be seen, from a consideration of all the facts in that case, that this court also held that, under authority from the state for the purpose of aiding navigation, the corporation had the right to keep and maintain in the river opposite to the riparian owner's land, and between the thread of the stream and the land of such owner, permanent fixtures driven into or resting upon the soil under the navigable waters of the river,

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

without making any compensation therefor. These opinions of this court seem to have adopted the doctrine of the cases above cited from the courts of other states and of the United States as to the power of the state to control the waters of all navigable rivers or other waters of the state, whenever such control is exercised in the interest of navigation. The action of the legislature upon this question of closing sloughs would seem to indicate that such was also the view of the case taken by that department of the government; for in chapter 399, Laws of 1876, in defining the powers of improvement companies, and authorizing them to close up sloughs, among other things, in aid of navigation, it is expressly provided that no such company shall close any sloughs unless they own the entire shore on both sides thereof, or have the written consent of the owners thereof; and this same provision is reenacted in section 1777, R. S. 1878. It would seem that the legislature must have supposed they had the power to grant the right to close such sloughs without the consent of the owners of the shores; otherwise it would have been unnecessary to declare that it should not be done except with their consent.

The view entertained by this court in the cases above cited and in this case are not in conflict with the cases of *Pumpelly v. Green Bay Co.*, 13 Wall., 166, and *Arimond v. Canal Co.*, 31 Wis., 316. In those cases the question was not as to the power of the state to interfere with or control the waters of navigable streams within their channels, but whether it had the right to force such waters out of their channels and flood the lands of the citizen without compensation. The distinction between these cases and cases like *Cohn v. Wausau Boom Co.*, *supra*, and the case at bar, are commented upon by the courts in the opinions delivered therein.

The case of *Delaplaine v. Railway Co.*, 42 Wis., 230, differs from the case at bar and *Cohn v. Wausau Boom Co.* in the fact that the obstruction placed in the navigable waters in that

The Black River Imp. Co. vs. The La Crosse Booming & Trans. Co. et al.

case in front of the plaintiff's land was not placed there in aid of navigation or for the improvement of the navigation, but for an entirely different purpose; and the doctrine laid down in that case must be restricted in its application to cases resting upon the same class of facts, and cannot be extended to a case where the state places obstructions in the navigable waters of the state for the purpose of improving the navigability of the stream. If it be thought that the powers granted to the plaintiff corporation in this case were improvidently granted, and that some limit should have been placed on its right to close up navigable waters or interfere with the riparian rights of owners on the navigable waters so closed up, the legislature is the tribunal to which application should be made to remedy such evil; and so, if the corporation has so made its improvements that they are inadequate to furnish the facilities to navigation on the river which the increased business on the same demands, the legislature is competent to give the proper relief in that direction. If the corporation has, by the way in which its improvements have been made and are maintained, acted unreasonably or unnecessarily, so as to obstruct navigation instead of improving it, the remedy should be by a proper action to forfeit the franchises of the corporation; or, if the defendants have suffered any injury from the obstruction to navigation, they have a remedy by an action at law; but they ought not to be permitted to abate without action the works of the plaintiff as a private nuisance.

We see no reason why the defendants may not, for their own purposes, maintain sorting and rafting works in the Black river opposite to their lands so that they do not interfere in any way with the works of the plaintiff; or why they may not excavate in front of their lands in Rice lake for the purpose of aiding in rafting logs, or for any other lawful purpose, if they do not interfere with the works of the plaintiff; and except as to these matters we are of the opinion that the court should

Sabotta vs. The St. Paul Fire & Marine Ins. Co.

have granted the relief demanded by the plaintiff in the complaint.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to that court to render judgment in accordance with this opinion.

A motion for a rehearing was denied May 10, 1882.

SABOTTA VS. THE ST. PAUL FIRE & MARINE INSURANCE
COMPANY.

February 14 — May 10, 1882.

COURT AND JURY. (1-2) *When court may properly direct a verdict for the plaintiff.*

PRACTICE IN SUPREME COURT. (3) *Remitting to court below the record on appeal, for correction.*

1. The court should not direct a verdict for the plaintiff, unless the evidence for the defendant, considering it as undisputed, and giving to it the most favorable construction in defendant's favor that it will legitimately bear, including all reasonable inferences from it, is insufficient to justify a verdict in defendant's favor.
2. The written application for the fire-insurance policy here sued upon, contained covenants that the answers therein were true and were warranties on the part of the assured, and the policy purported to be issued partly in consideration of such warranties, and was conditioned to be void if the assured had made any false representations or concealments material to the risk, or if he should assign the policy. There was evidence tending to show that the assured, in his application, falsely represented the incumbrances at much less than their real amount, and that he had assigned the policy before the loss. *Held*, that it was error to direct a verdict in his favor.
3. While it may be competent for this court, in a proper case, to remit to the court below the record on appeal, for a correction of the bill of exceptions, even after the cause has been decided (*Allerding v. Cross*, 15 Wis., 590), yet it refuses to do so in this case, on the ground that the failure to have the desired correction made before the cause was argued and submitted upon the merits, is not a case of excusable neglect.

Sabotta vs. The St. Paul Fire & Marine Ins. Co.

APPEAL from the Circuit Court for *Trempealeau* County. Action on a fire-insurance policy. The case is thus stated by Mr. Justice CASSIDAY:

The plaintiff's application for the policy upon which this suit is brought, contained the following questions and answers: "*Question 14.* What title has applicant to these premises? *Answer.* Fee-simple title. *Q. 15.* How many acres of land do you own? *A.* One hundred and twenty acres. *Q. 17.* Is your property incumbered? By and to what amount? *A.* Yes; \$400." It also contained a covenant and agreement that all the foregoing written answers to the several questions therein were true and correct in every particular, and warranties on the part of the assured, and that the same might be referred to in the policy as a part thereof, and the basis upon which the policy might be issued. The policy was issued January 6, 1879, against loss by fire and lightning, and recites that it was issued in part consideration of the warranties contained in the application, and that if the assured made any false or erroneous representations or concealments material to the risk, or assigned the policy without the consent of the company indorsed thereon, then in every such case the policy should be void. The property was destroyed December 31, 1879. On the trial, at the close of the plaintiff's testimony, the defendant moved for a nonsuit on the ground that it appeared from the plaintiff's own showing that he had assigned the policy. The motion was denied. By stipulation, all rebutting testimony in regard to the plaintiff's acquiring title to the land in question was omitted from the bill of exceptions, and no point was to be raised upon this appeal in regard to the title of the premises in question.

At the close of all the testimony the defendant's counsel moved the court for a nonsuit, on the grounds: (1) That the testimony shows conclusively that the plaintiff is not the only party in interest. (2) That the undisputed testimony shows a breach of the warranty in relation to incumbrances. (3) That

Sabotta vs. The St. Paul Fire & Marine Ins. Co.

under the testimony it should not be submitted to the jury to say whether there was a mistake in the application in relation to incumbrances. (4) That the policy is void by reason of the assignment, and the plaintiff cannot recover. Thereupon the court remarked: "In the situation of the evidence, I do not think the court should take the case from the jury. If counsel agree on the value, the verdict may be taken for the plaintiff, subject to the opinion of the court on the questions of law, or the case may go to the jury with instructions, at the defendant's option." The bill of exceptions states that, after excepting to this ruling, the defendant's counsel said: "We agree on the value of the property, counting the house at \$550, and personal property at \$300, making \$850. We desire the court to instruct the jury that the plaintiff's right of recovery is only three-fourths under the contract; that is, three-fourths of the real estate." Thereupon the court said: "I think the statutes fix the measure of damages. I will instruct the jury to find a verdict for the plaintiff for the full amount as agreed upon, subject to the opinion of the court on the questions of law." The bill of exceptions states that the defendant excepted to that portion of the charge which directed the jury to find a verdict for the full value of the real estate as agreed upon.

There was a verdict in plaintiff's favor for \$850; a new trial was refused; and defendant appealed from a judgment on the verdict.

The cause was submitted for the appellant on the brief of *J. W. Lusk*.

For the respondent there was a brief by *M. Mulligan*, his attorney, with *Olin & Grinde*, of counsel, and oral argument by *Mr. Olin*.

The following opinion was filed March 14, 1882:

CASSIDAY, J. The verdict having been directed for the plaintiff, the judgment entered thereon can only be sustained

Sabotta vs. The St. Paul Fire & Marine Ins. Co.

on the theory that the evidence in behalf of the defendant, had it remained undisputed, and giving to it the most favorable construction it will legitimately bear, and deeming everything as fully proved which such evidence tends to prove including all reasonable inferences from it, is insufficient to justify a verdict in favor of the defendant. *Lawrence University v. Smith*, 32 Wis., 592, and other cases cited in *Spensley v. Lancashire Ins. Co.*, ante, p. 433. Is there any evidence, when so construed, tending to prove, (1) that the plaintiff, at the time of applying for the insurance, misrepresented as to the amount of incumbrances on the premises; and (2) that the plaintiff assigned the policy?

It appears from the undisputed evidence that on the 21st of October, 1872, Smith, owning 126 acres of land, mortgaged the whole for \$690 to Allen, who assigned the mortgage to George Moser, June 21, 1875. The plaintiff, having purchased of Smith 80 of said 126 acres, mortgaged the same to Moser, May 19, 1876, for \$400; and the evidence tends very strongly, if not conclusively, to show that Moser, at the time of taking that mortgage, and in consideration therefor, agreed to release the 80 acres from the \$690 mortgage which he then held. January 2, 1877, the plaintiff gave to Moser another mortgage on the 80 for \$400 more. April 26, 1879, Moser began to foreclose the \$690 mortgage by advertising the whole 126 acres for sale to satisfy the balance of \$290 due thereon, after deducting the first \$400 mortgage; and 26 acres were sold in satisfaction thereof, together with interest and costs, June 9, 1879; and thereupon the 80 acres were released from that mortgage. The plaintiff admits that he signed the written application for insurance, which stated that there was but \$400 incumbrances on the premises; and he also admits that there were at the time two mortgages, of that amount each, on the premises, making \$800. The plaintiff also admits that June 9, 1879, he signed the blank assignment on the back of the policy, and gave the same so signed to the attorney of the

Sabotta vs. The St. Paul Fire & Marine Ins. Co.

owner of the two \$400 mortgages, at his request, and who at the time held the mortgages; he also admits that he subscribed and swore to the affidavit of January 12, 1880, and that the statements therein contained were correct. These admissions, the contents of these several papers so signed by the plaintiff, the undisputed facts in the case, and the nature and character of the other evidence given upon the trial, leave no doubt in our minds but that, under the rule stated, there was evidence tending to prove that, at the time of applying for the insurance, the plaintiff misrepresented as to the amount of incumbrances upon the premises, and also evidence tending to prove that the plaintiff made an absolute assignment of the policy. Whether he did either of those things or not, was therefore, in our opinion, a question of fact for the jury; and hence it was error to direct a verdict for the plaintiff.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

The respondent moved for a rehearing, and obtained an order on the appellant to show cause why the record should not be remitted to the circuit court for the purpose of having the bill of exceptions corrected. The following opinion was filed May 10, 1882:

PER CURIAM. This is an order to show cause why the record should not be remitted to the court below for the purpose of having the bill of exceptions corrected in certain respects. The cause has been argued, submitted, and decided. The object of remitting the record is to have stricken from the bill an exception which appears to have been taken by the appellant to the ruling of the court directing a verdict for the plaintiff. This court held the exception taken to such direction good, and reversed the judgment on that ground. It may be competent for this court in a proper case to remit the

Sabotta vs. The St. Paul Fire & Marine Ins. Co.

record for a correction of the bill of exceptions, even after the cause has been decided. This seems to have been done in *Allerding v. Cross*, 15 Wis., 530. But certainly a plain case of excusable neglect should be presented to justify such a practice. We are all clearly of the opinion that the record ought not to be remitted in this case. It is claimed that the bill of exceptions which was before the court does not contain certain amendments which were agreed upon by counsel as being correct. It seems to us, if this was so, that the respondent's attorneys were guilty of laches in failing to discover the mistake in the bill of exceptions before the cause was called for argument. They certainly had ample time and opportunity to examine the original bill on file and read the printed case before the cause was argued, and should have discovered the mistake in the bill, if one there were. Under the circumstances we do not think we should be warranted in remitting the record for any correction therein.

By the Court.—The order to show cause must be discharged.

The motion for a rehearing was then denied.

INDEX.

ABATEMENT OF ACTION.

The original plaintiff having died since the trial, and the judgment being reversed, so much of the action as seeks a recovery for injury to his person, has abated; while so much thereof as is for injury to property, and probably so much as is for expenses of medical attendance, etc., survives. *R. S.*, sec. 4258; *Meese v. Fond du Lac*, 48 Wis., 323. *Randall et al., Ex'rs, v. N. W. Telegraph Co.*, 140

ACCOUNTING.

See CHATTEL MORTGAGE, 1, 2, 4, 6, 7. TENANTS IN COMMON, 4.

ACKNOWLEDGMENT OF DEED.

See DEED, 1, 2. MARRIED WOMAN, 1. MORTGAGE, 5.

ACTION.

(A.) Cause of Action.

See AGENCY. CHATTEL MORTGAGE, 2-6. CONTRACTS, 1, 4. COUNTERCLAIM. COUNTIES, 1. CRIMINAL LAW, etc., 2. DEMAND. DIVORCE, 1. FLOWAGE OF LAND, 1. FORECLOSURE OF MORTGAGE, 11. FRAUDULENT CONVEYANCE. GARNISHMENT, 2. HIGHWAYS. INSURANCE, etc., 3-5. LANDLORD AND TENANT. MARRIED WOMAN, 2. NAVIGABLE RIVER, 1, 4. NOVATION OF CONTRACT. PLEADING, 2, 7 (2), 8, 12, 13. PAUPERS. RAILROADS, 1-4, 6, 9. REFORMATION OF DEED, 1. REFORMATION OF LEASE. RESCISSION OF CONTRACT, 1. SALE OF CHATTELS, 1. SLANDER, 1, 2. TENANTS IN COMMON, 2-4. TRESPASS.

(B.) By whom to be brought.

See CONTRACTS, 4 (3). LANDLORD AND TENANT, 1. TRESPASS.

(C.) Civil or Criminal?

See CRIMINAL LAW, etc., 1.

(D.) Tort or Contract?

See DAMAGES, 1.

(E.) Various Actions and Proceedings.

Against a County.

For office rent paid by county judge, 71.

For balance of salary of county treasurer, 291.

To cancel tax certificates, 578, 580.

Against a City.

By county, for unpaid special assessment credited and charged back to city, 415.

Against a Town.

By another town, for relief furnished to pauper, 499.

By private person for relief furnished to pauper, 645.

For injury from defective highway, 528.

Against Regents of State University.

To compel admission of complainant, as a student, into the university, 159.

Against a Public Officer.

Against the state superintendent [of public instruction]. *Certiorari* to review his proceedings in respect to the division of a school district, 150.

Against the secretary of state. *Mandamus* to compel the issue of a certain warrant to the relator as a state senator, 318.

Against a sheriff; to recover possession of chattels, 306.

Against a sheriff; proceeding by *habeas corpus*, 368.

Against a Railroad Company.

For a trespass to land, 136.

For injuries to the person of employee, from negligence, 228, 257.

For injuries to the person, from wrongful ejection of passenger from train, 234.

For injuries to the person, from negligently setting passengers off at wrong place, 342.

For other injuries to the person, from negligence, 610.

For injuries to horses, from neglect to fence, 543.

Against an Insurance Company.

On fire-insurance policy, 72, 364, 522, 637.

On policy of insurance against fire and lightning, 433.

Against a Bank.

For an accounting, and redemption of securities and other chattels, 33.

Against other Private Corporations.

For flowage of land, 107.

For injury to the person, from negligence, 140, 208.

For a conversion, 300.

For breach of contract to deliver lumber, 619.

For an injunction, 659.

Against an Administrator or Executor.

Garnishment, 295.

For construction of will, 452.

To foreclose mortgage, 636.

By the State.

Qui tam action, to recover penalty for neglect of official duty, 86.

Certiorari to review proceedings of state superintendent in regard to division of a school district, 150.

Mandamus to compel regents of state university to admit the relator, as a student, to the university, 159.

Mandamus to compel the secretary of state to issue a certain warrant to the relator, 318.

Prosecution of banker for receiving moneys, on deposit, etc., with knowledge of his insolvency, 348.¹

By a County.

Against a city, for amount of unpaid special assessment, credited and charged back to city, 415.

¹ This was in fact a proceeding by *habeas corpus* directed to a sheriff, to try the lawfulness of the petitioner's imprisonment. It is, however, entitled, on the calendar of this court, *Baker v. The State*, and that title has been retained in the report of the case. That title would be appropriate to a writ of error in the case of *The State v. Baker*, in which case the warrant of commitment here reviewed was issued.—RER.

By a Town.

Against another town, for relief furnished to a pauper, 499.

By a Village.

To recover penalty for violation of a liquor ordinance, 487.

By a Public Officer.

By clerk of circuit court, on bond of general assignee, 387.

By Private Corporation.

For breach of contract, 202.

On contract of guaranty, 425.

Garnishment, 295.

To enforce a lien on logs, for tolls, 313.

For an injunction, 659.

By Administrator or Executor.

For the construction of a will, 23.

For injury to the person of decedent, from negligence, 140, 257.

Actions arranged according to their subject matter.

On bond of general assignee for creditors, 387.

On policy of insurance against fire, etc., 72, 364, 433, 522, 687.

On covenant for maintenance, 554.

On promissory note, 193, 248, 491, 498, 544.

On contract of guaranty, 425.

On written contract to erect boiler, machinery, etc., 202.

On written contract for building house, for balance, 242.

On written contract to deliver lumber, 619.

On oral contract to pay money, 187.

For price of goods sold, 231, 253, 389, 525.

For commission on sale of house, 404.

For salary of county treasurer, 291.

For amount of unpaid special assessment credited by county to city, and charged back, 415.

Against county, for rent of office paid by county judge, 71.

Against town, for relief furnished pauper, 499, 645.

For flowage of land, 107, 133.

For a trespass to land, 99, 114, 136, 181, 473, 630.

For a conversion of chattels, 300, 539, 604.

For false representations in sale of securities, 391.

For injuries to personal property, from negligence, 548.

For injury to the person, from defective highway, 528.

For injury to the person of passenger, by unlawful ejection from train, 234.

For injury to the person from negligence, 140, 208, 226, 253, 342, 610.

For slander, 90.

For libel, 220.

To recover possession of real property, 66, 405, 459, 503.

To recover possession of personal property, 306.

Mandamus to compel admission of student to university, 159.

Mandamus to compel issue of warrant to state senator, 318.

Habeas corpus cum causa, 368.

Garnishment, 49, 295, 565, 583, 599.

Certiorari to state superintendent, 150.

Proceeding to disbar attorney, 379.

For a divorce, 422, 642.

For the construction of a will, 23, 452.

For an accounting and redemption, 38.

To enforce lien on logs, for tolls, 313.

To prevent cloud upon title, by cancelling tax certificates, 578, 580.

- To rescind sale and recover moneys paid, 395.
- To set aside a conveyance, for fraud, 652.
- For reformation of deed, 172, 311.
- To have deed declared a mortgage, and to foreclose, 551.
- For foreclosure of mortgage, etc., 102, 214, 573, 591, 636.
- For an injunction, 131, 659.
- To recover penalty for neglect of official duty, 86.
- To recover penalty for violation of village ordinance relating to sale of liquors, 487.
- Prosecution of banker for receiving deposits, etc., with knowledge of his insolvency, 368.

ADVERSE POSSESSION.

See DEDICATION, 3. FRAUD, 4. LANDLORD AND TENANT, 2. TAX DEED, 4.

No adverse possession of land is operative against the government. *Knight v. Leary*, 459

AFFIDAVIT IN ATTACHMENT.

See ATTACHMENT 2.

AGENCY.

See DEMAND, 1. EVIDENCE, 2. PAYMENT, 2. RATIFICATION.

In an action for the purchase price of hay delivered by plaintiff to one M., plaintiff's evidence tended to show that the hay was purchased by defendant, and that the latter did not disclose the fact that he was acting as agent for another; and defendant's evidence tended to show that he acted merely as bearer of messages to plaintiff from M. or S. or one of them, concerning the purchase, and that his relation to the transaction was fully disclosed to plaintiff. *Held*, that it was error to instruct the jury that "if defendant gave plaintiff a right to understand that he (defendant) was *making himself responsible* for the hay, and that plaintiff might look to him for the pay," then he was liable; the only question under the evidence being whether defendant purchased the hay, without disclosing his principal. *West v. Wells*, 525

ALTERATION OF RECORD.

See EVIDENCE, 10, 11.

AMENDMENT OF PLEADING.

See DIVORCE, 1. PLEADING, 4-6.

1. The granting or refusing of leave to amend an answer after verdict is much in the discretion of the court; and where the question of fact sought to be raised by an amendment has been virtually determined against the defendant by special verdict, there is no error in refusing leave to amend. *Ault v. W. & W. Manuf'g Co.*, 300
2. Plaintiff sued to recover an *undivided* third part of certain premises, by right of dower. The answer alleged that parcels *x* and *y* of the premises had been *set off* to plaintiff as her dower. After the evidence was closed, defendant was permitted to amend so as to allege that only parcel *x* had been set off as dower, and parcel *y* as homestead (plaintiff's homestead right being lost by remarriage); and plaintiff was also al-

lowed to amend her complaint so as to claim a life estate in the whole of parcels *x* and *y*, instead of in an undivided third of the whole premises. *Held*, that there was no error in allowing the amendment to the answer, and that, after such amendment, defendant was not bound by the admission in the original answer. *Durkee v. Felton, imp.*, 405

AMENDMENT OF STATE CONSTITUTION.
See CONSTITUTIONAL LAW.

ANSWER.

See DEMAND, 2. FORECLOSURE OF MORTGAGE, 11, 12. GARNISHMENT,
3. LIBEL, 1. LIMITATION OF ACTIONS, 2.

APPEAL.

See CRIMINAL LAW, etc., 1.

(A.) *To Supreme Court.*

See COSTS, 1. PRACTICE, 1.

1. On appeal from an order dismissing an attachment upon trial by the court of the traverse of the affidavit, this court reviews the evidence, and therefore disregards exceptions to the admission of evidence. *Rice v. Jerenson*, 248
2. While it may be competent for this court, in a proper case, to remit to the court below the record on appeal, for a correction of the bill of exceptions, even after the cause has been decided (*Allerding v. Cross*, 15 Wis., 530), yet it refuses to do so in this case, on the ground that the failure to have the desired correction made before the cause was argued and submitted upon the merits, is not a case of excusable neglect. *Sabottu v. St. Paul F. & M. Ins. Co.*, 687

(B.) *From Municipal Court.*

See MUNICIPAL COURT OF DANE COUNTY.

(C.) *From Justice's Court.*

See MUNICIPAL COURT OF DANE COUNTY.

On appeal from justice's court in a case where, by the statute (sec. 3767, R. S.), the cause is required to be "heard on the original papers and the return of the justice containing all the material evidence," etc., the court cannot take authority from a stipulation of the parties, to try the cause *de novo* as if originally brought in that court; and a judgment rendered upon such a trial is held, upon appeal, void for want of jurisdiction. *Bullard v. Kuhl*, 544

APPEALABLE ORDER.

See ATTORNEY-AT-LAW, 1. PRACTICE, 2.

APPLICATION OF PAYMENTS.

See PAYMENT, 1.

ARBITER.

See CONTRACTS, 2, 3.

ASSESSMENT.

See STAY OF PROCEEDINGS.

ASSIGNMENT, GENERAL.

See FRAUD, 5.

1. A provision in a general assignment for the benefit of creditors, that the assignee "shall, with all convenient diligence, sell and dispose of the property at public or private sale, as he may deem most beneficial to the interests of the creditors of [the assignor], and convert the same into money," does not authorize the assignee to sell on credit, and does not invalidate the assignment. *Hutchinson v. Lord*, 1 Wis., 294, and *Keep v. Sanderson*, 2 id., 42, distinguished. *Lord v. Devendorf, imp.*, 491
2. One member of a firm may assign his individual property so as to prefer his individual creditors to the creditors of the firm. *Ibid.*
3. It is *res adjudicata* by the finding and judgment in the action of this plaintiff against the principal debtors, constituting the firm of G. P. & Co., that said firm are liable to pay the former indebtedness of the firm of P., H. & Co. to said plaintiff; and, in this action against the general assignee of G. P. & Co., plaintiff may impeach the validity of the assignment, but not on the ground that he is a creditor of the earlier firm. *Rumery v. McCulloch, Garnishee, etc.*, 565
4. A general assignment for the benefit of creditors, inoperative as against creditors from a defect in the justification of the sureties on the assignee's bond (*Smith v. McCulloch*, 42 Wis., 564), held valid as between the parties thereto, to pass the property to the assignee, in trust. *Ibid.*
5. One of two partners, with the consent of the other, may convey real estate of the firm by an assignment under seal, in the name of the firm. *Ibid.*
6. An assignment with defective justification of the sureties was of partnership property, executed by both partners; the firm was insolvent, and went out of business; and one partner left the state and went to reside in Canada. Afterwards the other partner, without the knowledge of such non-resident, executed in the firm name a second assignment of the same property to the same assignee; and this was in all respects regular, and was (like the first) without preference, and was made to correct the defect in the first. There had been no reconveyance by the assignee, and no rights had intervened. Held, that the assignment was valid for all purposes. *Ibid.*

"ASSIGNMENT," defined in part.

See FORECLOSURE OF MORTGAGE, 4.

ATTACHMENT.

- [1. The statute (ch. 233 of 1880) allowing an attachment for a debt not due does not appear to authorize judgment *in personam* against the debtor to be rendered before the debt is due.] *Rice v. Jerenson*, 248
2. While an attachment issues on an affidavit of a proper person that he has good reason to believe certain facts, yet, on traverse of the affidavit, the attaching creditor has the burden of showing *those facts themselves*. *Lord v. Devendorf, imp.*, 491

ATTORNEY-AT-LAW.

1. An order of the circuit court forever disbarring an attorney and prohibiting him from practicing law in the courts of this state, held appealable under subd. 2, sec. 3069, R. S., as a final order affecting a substantial right made in a special proceeding. *In re Orton*, 379

2. Where the proceeding to disbar an attorney is by order to show cause, the charges against him should clearly appear in the order itself, or in some instrument appended thereto or (at least) on file; and even when the charges are to be supported by pleadings filed by such attorney, the charges themselves should be distinctly specified. *Ibid.*
3. The circuit court may properly, *on its own motion*, require an attorney to show cause why he should not be disbarred, when pleadings filed by him appear to require an investigation of that character. *Ibid.*

ATTORNEY'S FEES.

See DIVORCE, 2, 3. FORECLOSURE OF MORTGAGE, 13.

BANKERS AND BROKERS.

See CRIMINAL LAW, etc., 2, 3.

BILL OF EXCEPTIONS.

See APPEAL (A.), 2. JUDGMENT (F.), 8. PRACTICE, 2.

BILLS AND NOTES.

See COUNTERCLAIM.

BONA FIDES.

See MORTGAGE, 1.

BOOMS.

See FLOWAGE OF LAND, 1.

BOUNDARIES OF LAND.

1. A deed described the boundaries of the land thereby conveyed as "beginning at the N. W. corner" of a certain forty; running thence south a certain distance to a certain line, thence east along said line twenty chains; thence north a certain distance to a post; thence west twenty chains; thence south to the place of beginning, containing a specified number of acres. The grantor did not own any land west of the west line of said forty, but did own the land twenty chains in width east of said line, of the north and south length described in the deed. A survey of the tract conveyed was made at the time of the deed, which was supposed by the parties to be correct, and a partition fence was built by them along what was then supposed to be the east line of said tract. In making such survey, the surveyor and the parties intended to make the N. W. corner of said forty the starting point. The tract so described and surveyed contains the exact amount of land named in the deed. Three years later, the grantee removed the fence several rods farther east, claiming that to be the true eastern boundary of his land. In an action by the grantor against him for such removal as a trespass, *Held*:
 - (1) that the facts and circumstances above stated were admissible in evidence to aid in construing the deed.
 - (2) That upon those facts it appears clearly to have been the intention of the parties to convey and take the amount of land named from lands belonging to the grantor lying wholly east of the west line of said forty; and the boundaries of the tract conveyed must be determined by taking the true northwest corner of the said forty as the starting point, and following the calls of the deed, even though the east line as thus located should lie wholly east of the post named in the deed.
 - (3) That where there were several surveys made, which purported to start from the northwest corner of the forty, and gave different eastern boundary lines, it was for the jury to determine which was the true survey of that line. *Parkinson v. McQuaid*, 478

2. Where a boundary line was in dispute, the parties interested executed an agreement, which declares that they "hereby agree to abide by the survey now being made by Messrs. A., B. & C." *Held*, that the agreement was valid, and, after the same had been put in evidence, it might further be shown by oral evidence to what line the agreement refers, that the survey therein mentioned was made and agreed to by all the surveyors, that afterwards the contracting parties all expressed themselves satisfied with the result, and that one of the parties to the suit thereupon gave the other possession in accordance with such survey. *Ibid*.
3. The jury were instructed that, if they were unable to say from the proof that there was a greater reason for believing one way than the other as to where the line actually was, they might still settle the rights of the parties, so far as this case was concerned, outside of the question where the line actually was. But the context shows this to have meant merely that they might find for the defendant if they found that plaintiff consented to the removal of the fence, and that, failing to find such consent and being unable to determine from the evidence where the true line was, they might presume it to be where the parties first agreed that it was when the fence was built, and so might find for the plaintiff. *Held*, no error. *Ibid*.

BOUNDARIES OF TOWNS.

See TOWNS.

BROKERS AND BANKERS.

See CRIMINAL LAW, etc., 2, 3.

BURDEN OF PROOF.

See FORECLOSURE OF MORTGAGE, 2. FRAUD, 1.

CASES CITED, Etc.

Alexander v. Milwaukee,	- - -	16:247,	- - -	111, 112
Allen v. Chippewa Falls,	- - -	52:430,	- - -	112
Allerding v. Cross,	- - -	15:590,	- - -	692
Arimond v. Canal Co.,	- - -	31:316,	- - -	685
Att'y Gen. v. R. R. Cos.,	- - -	35:425,	- - -	338
Austin v. Austin,	- - -	45:523,	- - -	144
B— v. I—,	- - -	22:372,	- - -	98
Baass v. Railway Co.,	- - -	39:296,	- - -	553
Ballston Spa Bank v. Marine Bank,	- - -	16:120,	- - -	576
Bandlow v. Thieme,	- - -	53: 57,	- - -	636
Barber v. Kilbourn,	- - -	16:485,	- - -	394
Barden v. Smith,	- - -	7: 439,	- - -	437
Barkow v. Sanger,	- - -	47:500,	- - -	307, 656
Barteau v. West,	- - -	23:416,	- - -	100
Bassett v. Hughes,	- - -	43:319,	- - -	561
Bates v. Ableman,	- - -	13:644,	- - -	570
Baxter v. Payne,	- - -	1 Pin.: 501,	- - -	437
Beard v. Dedolph,	- - -	29:136,	- - -	655
Bessex v. Railway Co.,	- - -	45:477,	- - -	147, 275
Betta v. F. L. & T. Co.,	- - -	21: 80,	- - -	144
Black Riv. F. D. Ass. v. Ketchum,	- - -	54:313,	- - -	667
Black Riv. Imp. Co. v. Transp. Co.,	- - -	54:659,	- - -	316
Blair v. Railroad Co.,	- - -	20:262,	- - -	212
Blunt v. Walker,	- - -	11:334,	- - -	170
Bohlman v. Railway Co.,	- - -	40:157,	- - -	490
Boland v. Benson,	- - -	50:225,	- - -	388

CASES CITED, Etc.—continued.

Borden v. Gilbert, - - - -	13: 670,	- - - -	201
Boscobel v. Bugbee, - - - -	41: 59,	- - - -	488, 491
Bound v. Railroad Co., - - - -	45: 574,	- - - -	495
Brabbitts v. Railway Co., - - - -	38: 289,	- - - -	290, 274
Bracken v. Preston, - - - -	1 Pin.: 297,	- - - -	634
Brahe v. Eldridge, - - - -	17: 184,	- - - -	569
Brightman v. Kirner, - - - -	22: 54,	- - - -	490
Brooks v. Sullivan, - - - -	32: 444,	- - - -	571
Buffham v. Racine, - - - -	26: 449,	- - - -	299
Bullard v. Kuhl, - - - -	54: 544,	- - - -	636
Burlander v. Railroad Co., - - - -	26: 76,	- - - -	490
Burnham v. Fond du Lac, - - - -	15: 193,	- - - -	299
Cady v. Shepard, - - - -	12: 639,	- - - -	201
Candee v. Telegraph Co., - - - -	34: 479,	- - - -	352
Carpenter v. Tatro, - - - -	36: 297,	- - - -	655
Carroll's Will, - - - -	53: 228,	- - - -	598
Carter v. Dow, - - - -	16: 293,	- - - -	375
Castleman v. Griffin, - - - -	13: 535,	- - - -	394
Catlin v. Henton, - - - -	9: 476,	- - - -	596
Cecil v. Barber, - - - -	3: 297,	- - - -	546
Chamberlain v. Railroad Co., - - - -	7: 425,	- - - -	230
Chapman v. Ingram, - - - -	30: 290,	- - - -	627
Cheney v. Cook, - - - -	7: 413,	- - - -	57
C. & N. W. R'y Co. v. Oconto, - - - -	50: 193,	- - - -	121
Chinnock v. Stevens, - - - -	23: 396,	- - - -	546
Clapp v. Preston, - - - -	15: 543,	- - - -	201
Clark v. Farrington, - - - -	11: 306,	- - - -	170
Clark v. Janesville, - - - -	10: 135; 13: 414,	- - - -	121
Clemens v. Clemens, - - - -	28: 637,	- - - -	658
Clute v. Carr, - - - -	20: 532,	- - - -	135
Coad v. Coad, - - - -	40: 392,	- - - -	643
Cohn v. Wausau Boom Co., - - - -	47: 314,	108, 111, 682, 683,	685
Colby v. Franklin, - - - -	15: 311,	- - - -	438
Conklin v. Hawthorn, - - - -	29: 476,	- - - -	678
Conners v. The State, - - - -	47: 523,	- - - -	98
Conway v. Smith, - - - -	13: 125,	- - - -	564
Cook v. Barrett, - - - -	15: 596,	- - - -	561
Cooper v. Railway Co., - - - -	23: 668,	- - - -	230
Copp v. Ins. Co., - - - -	51: 643,	- - - -	450
Corbett v. Stonemetz, - - - -	15: 170,	- - - -	401
Cotterill v. Stevens, - - - -	10: 422,	- - - -	561
Cotton v. Sharpstein, - - - -	14: 226,	- - - -	378
Cottrill v. Cramer, - - - -	43: 242,	- - - -	95
Craker v. Railway Co., - - - -	36: 657,	- - - -	348
Cross v. Upson, - - - -	17: 623,	- - - -	634
Cunningham v. Brown, - - - -	44: 72,	174, 202,	402
Cunningham v. Lyness, - - - -	22: 245,	- - - -	149
Dakymple v. Milwaukee, - - - -	53: 178,	- - - -	421, 579
Damon v. Damon, - - - -	28: 510,	- - - -	424
Dane v. Derber, - - - -	28: 216,	- - - -	179, 180
Davidson v. Hackett, - - - -	49: 186,	- - - -	250, 496
Davis v. Barron, - - - -	13: 227,	- - - -	201
Davis v. Fulton, - - - -	52: 657,	- - - -	538
Day v. Elmore, - - - -	4: 190,	- - - -	57
Dayton v. Walsh, - - - -	47: 117,	- - - -	563, 655
Decker v. Trilling, - - - -	24: 610,	- - - -	201

CASES CITED, Etc.—continued.

Delaplane v. Railway Co.,	-	-	42: 230,	-	-	-	685
Dietrich v. Koch,	-	-	35: 618,	-	-	-	201, 658
Dodge v. McDonnell,	-	-	14: 553,	-	-	-	438
Dodge v. Williams,	-	-	46: 72,	-	-	-	38
Dore v. Milwaukee,	-	-	42: 108,	-	-	-	682
Dorsey v. Construction Co.,	-	-	42: 583,	-	-	-	270
Downer v. Howard,	-	-	44: 82,	-	-	-	643
Dreher v. Fitchburg,	-	-	22: 675,	-	-	-	149
Drummond v. Haysen,	-	-	46: 188,	-	-	-	174
Du Pont v. Davis,	-	-	30: 170,	-	-	-	480
Dykeman v. Budd,	-	-	3: 640,	-	-	-	545
Eaton v. White,	-	-	2: 292,	-	-	-	658
Eberhardt v. Sanger,	-	-	51: 72,	-	-	-	304
Edgerton v. Bird,	-	-	6: 527,	-	-	-	128
Edgerton v. Schneider,	-	-	26: 385,	-	-	-	519
Ely v. Daily,	-	-	40: 52,	-	-	-	174
Esterbrook v. Messersmith,	-	-	18: 545,	-	-	-	570
Ewen v. Railway Co.,	-	-	38: 627,	-	-	-	518
Falkner v. Dorman,	-	-	7: 338,	-	-	-	123
Farbank v. Newton,	-	-	46: 644,	-	-	-	559
Fargo v. Ladd,	-	-	6: 106,	-	-	-	569, 658
Felt v. Amidon,	-	-	48: 66,	-	-	-	525
Fenelon v. Hogoboom,	-	-	31: 172,	-	-	-	655, 656
Finney v. Oshkosh,	-	-	18: 309,	-	-	-	421
Fire Dept. of Oshkosh v. Tuttle,	-	-	48: 91,	-	-	-	490
Flanders v. Merrimack,	-	-	48: 567,	-	-	-	580
Flanders v. Thomas,	-	-	12: 410,	-	-	-	200
Flannagan v. Railway Co.,	-	-	45: 98,	-	-	-	270
Flannagan v. Railway Co.,	-	-	50: 462,	-	-	-	230, 270
Flick v. Weatherbee,	-	-	20: 392,	-	-	-	353
Ford v. Smith,	-	-	27: 261,	-	-	-	61, 63
Frank v. Dunning,	-	-	38: 270,	-	-	-	95
French v. Owen,	-	-	2: 250,	-	-	-	135
Gardner v. Van Norstrand,	-	-	13: 543,	-	-	-	430
Geary v. Bennett,	-	-	53: 444,	-	-	-	95
Geisse v. Beall,	-	-	3: 367,	-	-	-	569
Gibson v. Gibson,	-	-	46: 449,	-	-	-	424
Goodell v. Blumer,	-	-	41: 442,	-	-	-	123
Gove v. White,	-	-	20: 425,	-	-	-	479
Grannis v. Hooker,	-	-	29: 65,	-	-	-	403
Gumz v. Railway Co.,	-	-	52: 676,	-	-	-	261
Gutwillig v. Stumes,	-	-	47: 434,	-	-	-	226
Hamilton v. Fond du Lac,	-	-	40: 50,	-	-	-	174
Hamlin v. Haight,	-	-	32: 238,	-	-	-	393
Hannan v. Oxley,	-	-	23: 519,	-	-	-	655
Hark v. Gladwell,	-	-	49: 172,	-	-	-	533
Harrington v. Smith,	-	-	28: 43,	-	-	-	340
Harrison v. Milwaukee Co.,	-	-	51: 645,	-	-	-	682
Haseltine v. Mosher,	-	-	51: 443,	-	-	-	130, 131
Haskins v. Lumsden,	-	-	10: 359,	-	-	-	98, 223
Hayes v. Lienlokken,	-	-	48: 509,	-	-	-	514
Hazelton v. Putnam,	-	-	8 Pin.: 107,	-	-	-	135
Hazelton v. Week,	-	-	49: 661,	-	-	-	131
Hazleton v. Union Bank,	-	-	32: 34,	-	-	-	144, 193, 393, 538
Heas v. Murphy,	-	-	43: 45,	-	-	-	37
Hill v. Railroad Co.,	-	-	14: 291,	-	-	-	299

CASES CITED, Etc.—continued.

Hodson v. Carter, - - - -	2 Pin.: 212,	- - - -	561
Hopkins v. Langton, - - - -	30: 379,	- - - -	657
Horton v. Dewey, - - - -	53: 410,	- - - -	655
Howland v. Needham, - - - -	10: 495,	- - - -	378
Hoyt v. Hudson, - - - -	41: 105,	- - - -	147
Hudson v. McCartney, - - - -	33: 331,	- - - -	247
Huey v. Van Wie, - - - -	23: 613,	- - - -	69
Hungerford v. Cushing, - - - -	8: 332,	- - - -	553
Hungerford v. Redford, - - - -	29: 345,	- - - -	634
Hutchinson v. Lord, - - - -	1: 294,	- - - -	494, 495
Hutchinson v. Railway Co., - - - -	41: 552,	- - - -	304
Hyde v. Barker, - - - -	1 Pin.: 305,	- - - -	437
Hyde v. Chapman, - - - -	33: 392,	- - - -	307, 656
Imhoff v. Railroad Co., - - - -	22: 681,	- - - -	438
Ingram v. Rankin, - - - -	47: 406,	- - - -	627
Janvrin v. Maxwell, - - - -	23: 51,	- - - -	658
Jarstadt v. Morgan, - - - -	48: 245,	- - - -	102
Jarvis v. Hamilton, - - - -	37: 87,	- - - -	524
Jenks v. Racine, - - - -	50: 318,	- - - -	421
Jensen v. Supr's Polk Co., - - - -	47: 298,	- - - -	532
Johannes v. Youngs, - - - -	45: 448,	- - - -	399
Johnson v. Lumber Co., - - - -	45: 119,	- - - -	399
Johnston v. Hamburger, - - - -	13: 175,	- - - -	215, 438
Jones v. Collins, - - - -	16: 594,	- - - -	128
Jones v. Lake, - - - -	2: 210,	- - - -	658
Jones v. Railway Co., - - - -	49: 352,	- - - -	433
Jucker v. Railway Co., - - - -	52: 150,	- - - -	438
Keep v. Sanderson, - - - -	2: 42,	- - - -	494, 495
Keep v. Sanderson, - - - -	12: 352,	- - - -	495
Kellogg v. Railway Co., - - - -	26: 223,	- - - -	355, 359
Kelly v. Fond du Lac, - - - -	29: 439,	- - - -	524
Kennedy v. Holborn, - - - -	16: 457,	- - - -	222
Kennedy v. Knight, - - - -	21: 340,	- - - -	519
Kenworthy v. Ironton, - - - -	41: 647,	- - - -	538
Ketchum v. Breed, - - - -	51: 164,	- - - -	132
King v. Ritchie, - - - -	18: 554,	- - - -	201
Kingsley v. Supervisors, - - - -	49: 649,	- - - -	582
Kimball v. Fernandez, - - - -	41: 329,	- - - -	222
Kimball v. Noyes, - - - -	17: 695,	- - - -	561
Kimball v. Rosendale, - - - -	42: 407,	- - - -	338
Knox v. Cleveland, - - - -	13: 245,	- - - -	122, 128
Knox v. Galligan, - - - -	21: 470,	- - - -	519
Knox v. Johnston, - - - -	26: 41,	- - - -	596
Krouskop v. Shontz, - - - -	51: 204,	- - - -	564
La C. & M. R. R. Co. v. Seeger, - - - -	4: 263,	- - - -	658
Langhoff v. Railway Co., - - - -	19: 489,	- - - -	438
Lawrence University v. Smith, - - - -	32: 592,	- - - -	498, 690
Leadbetter v. Laird, - - - -	45: 522,	- - - -	524
Lemke v. Daegling, - - - -	52: 498,	- - - -	559
Lemon v. Hayden, - - - -	13: 160,	- - - -	102
Lewis v. Disher, - - - -	32: 504,	- - - -	128, 130
Lewis v. Stout, - - - -	22: 234,	- - - -	490
Lincoln v. Cross, - - - -	11: 91,	- - - -	569
Livesley v. Lasalette, - - - -	38: 38,	- - - -	144
Lord v. Devendorf, - - - -	54: 491,	- - - -	498
Lowe v. Stringham, - - - -	14: 222,	- - - -	589

CASES CITED, Etc.—continued.

Luck v. Ripon, - - -	52: 196,	- - -	213
Luning v. The State, - - -	2 Pin.: 215,	- - -	534
Luth. Ev. Church v. Gristgan, - - -	34: 323,	- - -	399
Lyman v. Babcock, - - -	40: 503,	- - -	484
Mad., W. & M. P. R. Co. v. Plankroad Co., - - -	5: 173,	- - -	170
Mann v. Stowell, - - -	3 Pin.: 220,	- - -	401, 403
Mansenu v. Edwards, - - -	53: 457,	- - -	579
Mappes v. Supervisors, - - -	47: 31,	- - -	647, 650
Marsh v. Supervisors, - - -	38: 250,	- - -	199
Maxwell v. Kennedy, - - -	50: 645,	- - -	97-8
McCandless v. Railway Co., - - -	45: 365,	- - -	149
McDowell v. Laev, - - -	35: 171,	- - -	561
McHugh v. Railway Co., - - -	41: 79,	- - -	304
McNarra v. Railway Co., - - -	41: 69,	- - -	304
McWilliams v. Brookens, - - -	39: 334,	- - -	402
Mead v. Nelson, - - -	52: 402,	- - -	579
Meese v. Fond du Lac, - - -	48: 323,	- - -	150
Mehlhop v. Pettibone, - - -	54: 652,	- - -	307
Mericle v. Mulka, - - -	1: 366,	- - -	218
Meurer's Will, - - -	44: 392,	- - -	38
Meyers v. Rahte, - - -	46: 655,	- - -	564
Miles v. Chamberlain, - - -	17: 446,	- - -	546
Milwaukee v. Gross, - - -	21: 241,	- - -	375
Mil. Ind. School v. Milwaukee Co., - - -	40: 323,	- - -	375-6
Mil. Iron Co. v. Schubel, - - -	29: 444,	- - -	153, 157
Mil. & C. R. R. Co. v. Hunter, - - -	11: 160,	- - -	147
Mil. & M. R. R. Co. v. Finney, - - -	10: 380,	- - -	144
Moir v. Doison, - - -	14: 279,	- - -	518
Monitor I. W. Co. v. Ketchum, - - -	44: 130,	- - -	174
Monroe v. Ft. Howard, - - -	50: 228,	- - -	582
Montgomery v. Deeley, - - -	3: 709,	- - -	95
Moore v. Railroad Co., - - -	34: 174,	- - -	490
Morrill v. The State, - - -	38: 423,	- - -	375
Morrison v. Construction Co., - - -	44: 405,	- - -	265
Moseley v. Chamberlain, - - -	18: 700,	- - -	230
Mowrey, In re, - - -	12: 52,	- - -	378
Mowry v. Bank, - - -	54: 38,	- - -	200
Murphey, In re, - - -	39: 286,	- - -	380
Naylor v. Railway Co., - - -	53: 661,	- - -	229
Norris v. Persons, - - -	49: 101,	- - -	250
Norton v. Kearney, - - -	10: 443,	- - -	494, 495
Oconto Co. v. Jerrard, - - -	46: 317,	- - -	122
Oleson v. Railway Co., - - -	36: 333,	- - -	490
Oliver v. La Valle, - - -	36: 592,	- - -	357, 360, 362
Page v. Sumpter, - - -	53: 652,	- - -	590
Paine v. Wilcox, - - -	16: 202,	- - -	576
Parish v. Eager, - - -	15: 532,	- - -	128
Patten v. Railway Co., - - -	32: 524,	- - -	355, 362
Patten v. Railway Co., - - -	36: 413,	- - -	355
Pellage v. Pellage, - - -	32: 136,	- - -	524
Pepper v. O'Dowd, - - -	39: 533,	- - -	130
Perry v. Williams, - - -	39: 339,	- - -	61, 64
Pettibone v. Perkins, - - -	6: 616,	- - -	200
Pettit v. May, - - -	34: 674,	- - -	121
Phillips v. Phillips, - - -	27: 252,	- - -	643, 644
Pick v. Hydraulic Co., - - -	27: 433,	- - -	366

CASES CITED, ETC.—continued.

Pier v. Fond du Lac,	-	-	38: 470,	-	-	-	128
Plumer v. Supervisors,	-	-	46: 163,	-	-	-	582
Porter v. Vandercook,	-	-	11: 70,	-	-	-	215
Potter v. Railway Co.,	-	-	21: 372,	-	-	-	149
Potter v. Stransky,	-	-	48: 242,	-	-	-	519
Prescott v. Evarts,	-	-	4: 314,	-	-	-	521
Prideaux v. Mineral Point,	-	-	43: 513, 524,	-	-	147,	537
Putnam v. Bicknell,	-	-	18: 333,	-	-	-	655
Racine Co. Bank v. Keep,	-	-	13: 209,	-	-	-	401
Rahn v. Gunnison,	-	-	12: 528,	-	-	-	215
Ralph v. Railway Co.,	-	-	32: 177,	-	-	-	214
Read v. Morse,	-	-	34: 315,	-	-	-	625
Reynolds v. Vilas,	-	-	8: 471,	-	-	-	658
Rice v. Jerenson,	-	-	54: 248,	-	-	-	496
Richards v. Noyes,	-	-	44: 609,	-	-	-	144
Richardson v. Chynoweth,	-	-	26: 656,	-	-	353,	627
Ripon v. Bittel,	-	-	30: 619,	-	-	-	534
Roberts v. McGrath,	-	-	38: 52,	-	-	-	98
Robinson v. Dale,	-	-	38: 330,	-	-	-	430
Rogers v. Brightman,	-	-	10: 55,	-	-	-	98
Rounsavell v. Pease,	-	-	45: 506,	-	-	-	144
Sabine v. Johnson,	-	-	35: 185,	-	-	-	112
Sage v. Strong,	-	-	40: 575,	-	-	-	430
Sams v. Stein,	-	-	53: 569,	-	-	-	524
Sanford v. McCreedy,	-	-	28: 103,	-	-	250, 518,	596
Sans v. Joeris,	-	-	14: 663,	-	-	-	224
Scheer v. Keown,	-	-	34: 349,	-	-	-	388
Scheiber v. Kaebler,	-	-	49: 291,	-	-	-	70
Schettler v. Brunette,	-	-	7: 197,	-	-	-	658
Schomer v. Ins. Co.,	-	-	50: 579,	-	-	-	438
School District v. Wolfe,	-	-	12: 685,	-	-	-	153
Schultz v. Railway Co.,	-	-	48: 375,	-	-	-	274
Scott, Town of, v. Clayton,	-	-	51: 186,	-	-	-	501
Scott v. Seaver,	-	-	52: 175,	-	-	-	217
Sears v. Low,	-	-	19: 96,	-	-	-	57
Shafer v. Ins. Co.,	-	-	53: 361,	-	-	-	75
Shepard v. Gas Light Co.,	-	-	15: 318,	-	-	353,	627
Sherman v. Railroad Co.,	-	-	40: 645,	-	-	138,	139
Simmons v. Putnam,	-	-	11: 193,	-	-	-	403
Single v. Town of Stettin,	-	-	49: 645,	-	-	-	582
Smith v. Ford,	-	-	48: 161,	-	-	-	128
Smith v. Garden,	-	-	28: 635,	-	-	-	470
Smith v. Janesville,	-	-	52: 680,	-	-	-	579
Smith v. Mariner,	-	-	5: 578,	-	-	-	678
Smith v. McCulloch,	-	-	42: 564,	-	-	-	568
Smith v. Peckham,	-	-	39: 414,	-	-	-	518
Smith v. Railway Co.,	-	-	42: 526,	-	-	230, 264,	274
Smith v. Sherry,	-	-	50: 210,	-	-	-	579
Smith v. Smith,	-	-	19: 522,	-	-	-	524
Snyder v. Wright,	-	-	13: 688,	-	-	-	250
Soule v. The State,	-	-	19: 593,	-	-	-	87
Spaulding v. Railway Co.,	-	-	33: 582,	-	-	-	625
Spensley v. Ins. Co.,	-	-	54: 433,	-	-	-	690
State ex rel. v. Babcock,	-	-	42: 138,	-	-	-	88
State ex rel. v. Ludington,	-	-	33: 107,	-	-	-	375
State ex rel. v. Pierce,	-	-	35: 93,	-	-	-	121

CASES CITED, Etc.—continued.

State v. Allison,	- - -	47: 543,	- - -	635
State v. French,	- - -	2 Pin.: 180,	- - -	339
State v. Hartfiel,	- - -	24: 60,	- - -	376
State v. Huck,	- - -	29: 202,	- - -	88
State v. Jager,	- - -	19: 235,	- - -	380, 488
State v. Mushied,	- - -	12: 561,	- - -	380, 488
Steffen v. Railway Co.,	- - -	46: 259,	- - -	230, 266, 269
Stephenson v. Wilson,	- - -	37: 482,	- - -	128, 130
Sterling v. Ripley,	- - -	3 Pin.: 155,	- - -	657
Stetler v. Railway Co.,	- - -	46: 498,	- - -	230, 279
Stetler v. Railway Co.,	- - -	49: 609,	- - -	279
Stevens Point Boom Co. v. Reilly,	- - -	44: 235,	- - -	338, 672
Stevens Point Boom Co. v. Reilly,	- - -	46: 237,	- - -	683, 684
Stewart v. Ripon,	- - -	38: 591,	- - -	357, 360, 362
Stewart v. Stewart,	- - -	41: 624,	- - -	250
Stoltz v. Kretschmar,	- - -	24: 233,	- - -	633
Taylor v. The State,	- - -	35: 293,	- - -	375
Teetshorn v. Hull,	- - -	30: 162,	- - -	398
Tenney v. Lenz,	- - -	16: 566,	- - -	375
Townley v. Railway Co.,	- - -	53: 626,	- - -	439
Trowbridge v. Sickler,	- - -	42: 417; 48: 424,	- - -	307
Tupper v. Huson,	- - -	46: 647,	- - -	98, 100
Tuttle v. Wilson,	- - -	52: 643,	- - -	541
Van Buren v. Downing,	- - -	41: 422,	- - -	375
Van Doran v. Armstrong,	- - -	28: 236,	- - -	213
Van Trott v. Wiese,	- - -	36: 439,	- - -	401
Verbeck v. Verbeck,	- - -	6: 159,	- - -	546
Vincent v. Starks,	- - -	45: 458,	- - -	512
Vliet v. Rowe,	- - -	1 Pin.: 413,	- - -	95
Walsh v. Railway Co.,	- - -	42: 23,	- - -	348, 354
Ward v. Busack,	- - -	46: 407,	- - -	304
Ward v. Railway Co.,	- - -	29: 144,	- - -	149
Warder v. Baldwin,	- - -	51: 450,	- - -	61
Waterman v. Dutton,	- - -	6: 265,	- - -	570
Watry v. Hiltgen,	- - -	16: 516,	- - -	546
Webber v. Quaw,	- - -	46: 118,	- - -	131
Webster v. Moe,	- - -	35: 75,	- - -	130
Wedgwood v. Railway Co.,	- - -	41: 478,	- - -	264, 274, 275
Wedgwood v. Railway Co.,	- - -	44: 44,	- - -	275
Weil v. Altenhofen,	- - -	26: 704,	- - -	95
Weil v. Schmidt,	- - -	28: 137,	- - -	95
Wellauer v. Fellows,	- - -	48: 105,	- - -	576
Wells v. Millet,	- - -	23: 64,	- - -	191
Wheeler v. Konst,	- - -	46: 398,	- - -	98
Wheeler v. Westport,	- - -	30: 392,	- - -	148
Wilber v. Wilber,	- - -	52: 298,	- - -	455
Willard v. Reas,	- - -	26: 540,	- - -	199
Willer v. Bergenthal,	- - -	50: 474,	- - -	596
Williams v. Mitchell,	- - -	49: 284,	- - -	218
Williams v. Porter,	- - -	41: 422,	- - -	304
Williams v. Williams,	- - -	29: 518,	- - -	643
Wilson v. Henry,	- - -	35: 241,	- - -	128, 130
Wilson v. Henry,	- - -	40: 594,	- - -	130
Wilson v. Hunter,	- - -	14: 683,	- - -	570
Wilson v. Noonan,	- - -	27: 599,	- - -	98
Wilson v. Noonan,	- - -	35: 346,	- - -	222

CASES CITED, Etc.—continued.

Wis. C. R. R. Co. v. Taylor Co.,	-	52: 37,	-	-	-	162
Wis. Riv. Imp. Co. v. Lyons,	-	30: 61,	-	-	-	682-3
Wiswell v. Baxter,	-	20: 680,	-	-	-	519
Witter v. Lyon,	-	84: 564,	-	-	-	381
Wittmann v. Watry,	-	45: 493,	-	-	-	399
Wood v. Blythe,	-	42: 300,	-	-	-	523
Wood v. Railway Co.,	-	82: 398,	-	-	-	348
Wright v. Day,	-	33: 260,	-	-	-	477
Wright v. W. W. Co.,	-	50: 167,	-	-	-	131, 540
Wright v. Young,	-	6: 127,	-	-	-	202, 401
Yates v. Yates,	-	21: 473,	-	-	-	553
Zaegel v. Kuster,	-	51: 31,	-	-	-	455

CASES CRITICISED, DISTINGUISHED, Etc.

1. *Arimond v. G. B. & M. Canal Co.*, 31 Wis., 316, and *Delaplaine v. C. & N. W. Railway Co.*, 42 id., 230 (as to rights of riparian owners on navigable waters), distinguished. *Black River Imp. Co. v. La Crosse B. & T. Co. et al.*, 660, 685
2. *Damon v. Damon*, 28 Wis., 510 (as to making third persons parties in actions for divorce), distinguished. *Varney v. Varney*, 422, 424
3. *Delaplaine v. C. & N. W. Railway Co.*, 42 Wis., 230. See No. 1.
4. *Finney v. Oshkosh*, 20 Wis., 209, and *Jenks v. Racine*, 50 id., 318 (as to rights and liabilities of city and county in respect to delinquent special assessments), distinguished. *Sheboygan Co. v. City of Sheboygan*, 415, 421
5. *Frank v. Dunning*, 38 Wis., 270; *Weil v. Allenhofen*, 26 id., 708; and *Vliet v. Rowe*, 1 Pinney, 413 (as to what words are actionable *per se* in slander), distinguished. *Campbell v. Campbell*, 95
6. *Haskins v. Lumsden*, 10 Wis., 359, and *Sans v. Joerris*, 14 id., 663 (as to evidence in mitigation of damages, in libel), distinguished. *Evison v. Cramer et al.*, 224
7. *Hayes v. Lienlokken*, 48 Wis., 509 (as to foreclosure of mortgage in this state by sale without suit, by foreign executor), distinguished. *Hayes v. Frey et al.*, 503, 514
8. *Hudson v. McCartney*, 33 Wis., 331 (as to evidence to impeach decision of arbiter or umpire in building contract), distinguished. *Tetz v. Butterfield*, 247
9. *Hutchinson v. Lord*, 1 Wis., 294, and *Keep v. Sanderson*, 2 id., 42 (as to what words in general assignment will avoid it), distinguished. *Lord v. Devendorf, imp.*, 491, 494
10. *Jarstadt v. Morgan*, 48 Wis., 245, and *Lemon v. Hayden*, 13 id., 160 (as to acts of public authorities in taxing lands claimed to be a public highway, and their bearing on the question of dedication, etc.), distinguished. *Trerice et al. v. Barteau*, 99, 102
11. *Jenks v. Racine*, 50 Wis., 318. See No. 4.
12. *Keep v. Sanderson*, 2 Wis., 42. See No. 9.
13. *Knox v. Cleveland*, 13 Wis., 245, and *Oconto Company v. Jerrard*, 46 id., 317 (as to when deed of land as for delinquent taxes will set statute of limitation running), distinguished. *Smith v. Sherry*, 122-3

14. *Lemon v. Hayden*, 13 Wis., 160. See No. 10.
15. *Mappes v. The Supervisors*, 47 Wis., 31 (as to liability of town for board of pauper furnished by private person), distinguished. *McCaffrey v. Town of Shields*, 645, 647
16. *Mericle v. Mulks*, 1 Wis., 366 (as to necessity of written signature to an instrument), distinguished. *Mezchen v. More, imp.*, 218
17. *Oconto Company v. Jerrard*, 46 Wis., 317. See No. 13.
18. *Sans v. Joerris*, 14 Wis., 663. See No. 6.
19. *State ex rel. Reynolds v. Babcock*, 42 Wis., 138. A remark *obiter* therein upon the term "laid out" as applied to a highway in the statutes, withdrawn. *State et al. v. Siegel*, 88
20. *Vliet v. Rowe*, 1 Pinney, 413. See No. 5.
21. *Walsh v. Railway Co.*, 42 Wis., 23 (as to the rule of damages for negligent breach of duty by railway company), distinguished. *Brown et ux. v. C., M. & St. P. Railway Co.*, 350, 354
22. *Webber v. Quaw*, 46 Wis., 118, and *Webster v. Moe*, 35 id., 75. An inadvertent use of the word "title" therein, and a mistaken construction of the decision, corrected. *Smith v. Sherry*, 130
23. *Webster v. Moe*, 35 Wis., 75. See No. 22.
24. *Wedgwood v. Railway Co.*, 41 Wis., 478 (as to proof of negligence in railway company in furnishing defective cars, etc.), distinguished. *Ballou, Adm'x, v. C., M. & St. P. Railway Co.*, 264
25. *Weil v. Altenhofen*, 26 Wis., 708. See No. 5.
26. *Wood v. Blythe*, 42 Wis., 300 (as to appealability of order extending time for settling bill of exceptions), distinguished. *Evans v. St. Paul F. & M. Ins. Co.*, 522

ADMINISTRATORS AND EXECUTORS.

See FORECLOSURE OF MORTGAGE, 3-5. GARNISHMENT, 2.

ADMISSION.

See AMENDMENT OF PLEADING, 2. EVIDENCE, 2. GARNISHMENT, 1.

CAUSE OF ACTION.

See ACTION (A.).

CERTIFICATE.

1. *Of Sale, under Mortgage.*
See FORECLOSURE OF MORTGAGE, 7.
2. *Of Acknowledgment of Deed.*
See DEED, 1, 2.
3. *Of Official Character of Notary.*
See EVIDENCE, 13.

CERTIORARI.

Where *certiorari* runs to an officer (in this case the superintendent of public instruction), who has only *quasi* judicial power to act in proceedings of a summary character, out of the course of the common law, the record will be reviewed to ascertain not only whether he acted within his jurisdiction, but whether he acted strictly *according to law*; but his decision upon the merits, or upon mere questions of fact as to which there was evidence to support it, will not be reviewed. *State ex rel. Moreland v. Whitford*, 150

CHARTER.

1. *Of Municipal Corporation.*
See COUNTIES, 2, 3. LICENSE LAWS.
2. *Of Private Corporation.*
See NAVIGABLE RIVERS, 4.

CHATTEL MORTGAGE.

1. Where mortgaged property has been sold or used by the mortgagee, or its condition changed, so that it cannot be restored to the mortgagor, the only relief available to the latter in an action to redeem is to have an accounting and be allowed the value of the property when taken from him. *Mowry v. First Nat. Bk.*, 38
2. Where the mortgagee of chattels subsequently received from the mortgagor collateral security, and then, after disposing of the mortgaged property in such a manner as to render him liable to account to the mortgagor, sold the collaterals: *Held*, that if it shall appear on an accounting that the mortgaged property was equal in value to the mortgage debt, the sale of the collaterals must be treated as unauthorized, and the mortgagee must account for their actual value. *Ibid.*
3. In general, where the mortgagee of chattels has taken possession, and the mortgagor's legal rights have been forfeited by a breach, his remedy is by an action to redeem. *Boyd v. Beaudin et al.*, 193
4. Where a chattel mortgagee has realized money from the use of the property and has unlawfully sold part of it, the mortgagor may sue in equity to charge him with the moneys thus realized, and to redeem the unsold part on payment of any sum which may be found due on the mortgage debt upon an accounting; and where an accounting by the mortgagee is necessary to determine the amount so due, no tender of the amount is necessary before bringing the action to redeem. *Ibid.*
5. The want of a tender of the balance due, before the commencement of an action to redeem, will not defeat the action, but affects only the costs. *Ibid.*
6. In an action on a note given for the price of an interest in a chattel, secured by a mortgage thereof, the defendant may set up an *equitable counterclaim* for an accounting by plaintiff as to moneys realized by him from the use or unlawful sale of the property, and for a redemption on payment of any balance found due. *Ibid.*
7. The purchaser of an interest in the mortgaged chattels at such unlawful sale, is not a necessary or proper party to such action for an accounting and to redeem, where no relief is sought against his claim of title to such interest. *Ibid.*
8. Whether a chattel mortgagee may in any case become the purchaser at a public sale under the mortgage, so as to cut off the equity of redemption in the mortgagor, is not here determined. *Ibid.*
9. When the mortgagee makes the sale without the knowledge of the mortgagor, in violation of an agreement or understanding between them, and purchases himself, at a grossly inadequate price, and renders no account of the sale to the mortgagor, the sale will be avoided at the suit of the latter. *Ibid.*

CITIES.

See COUNTIES, 2, 3.

COLLATERAL SECURITIES.

See CHATTEL MORTGAGE, 2.

COMMON CARRIER.

See RAILROADS, 4-6, 9, 10.

COMPENSATION FOR LAND.

See RAILROADS, 1-3.

COMPENSATION OF MEMBERS OF THE LEGISLATURE.

See CONSTITUTIONAL LAW, 4.

COMPLAINT.

See DAMAGES, 1. DIVORCE, 1. EVIDENCE, 5. LIMITATION OF ACTIONS, 3.

CONDEMNATION OF LAND.

See RAILROADS, 1-3.

CONFLICT OF LAWS.

Whether, where land conveyed is in one state, and the deed is executed in another state, between residents thereof, its validity, so far as it depends upon the relation of the parties to each other (in this case as husband and wife), is to be determined by the law of the state of residence or that of the state in which the land lies, *quærs.* *Mehlhop v. Pettibone et ux.*, 632

CONSIDERATION.

See MORTGAGE, 4. RESCISSION OF CONTRACT, 2.

One who has voluntarily consented to the use of money in the hands of another to pay the debts of a third person, may revoke such consent before the payment of the money. *Kirby et al. v. Corning, Garnishee, et al.*, 599

CONSTITUTIONAL LAW.

See CRIMINAL LAW, etc., 3. STATE SUPERINTENDENT.

1. No amendment can be made to the constitution of this state [in the absence of a constitutional convention] without a compliance with the provisions of sec 1, art. XII thereof, both in the passage of such amendment by the legislature and in the manner of submitting it to the people. *State ex rel. Hudd v. Timme, Sec'y, etc.*, 318
2. It is within the discretion of the legislature to submit several distinct propositions to the people as "one amendment," within the meaning of said sec. 1, art. XII, if such propositions relate to the same subject and are all designed to accomplish one purpose. *Ibid.*
3. The several propositions submitted in 1831 all relate to a change from annual to biennial sessions of the legislature, and were intended to effect such a change; and they were properly submitted as a single amendment, and were adopted as such. *Ibid.*
4. Said amendment cannot go into effect until an election of members of the assembly and of senators from the odd-numbered districts shall have been held in November, 1882, and the legislature shall have fixed the time when sessions of the biennial legislature shall be held; and members of the legislature heretofore elected hold under the old provisions of the constitution, and the compensation to which they are entitled is that prescribed by those provisions. *Ibid.*

CONTINUANCE.

The continuance of a cause for absence of witnesses is a matter within the discretion of the court. *Hayes v. Frey et al.*, 503

CONTRACTS.

See AGENCY. ASSIGNMENT. BOUNDARIES OF LAND. CHATTEL MORTGAGE. CONFLICT OF LAWS. CONSIDERATION. DAMAGES, 2, 6-9. DEDICATION. DEED. FORECLOSURE OF MORTGAGE, 1, 6, 10. FRAUD. 4, 5. FRAUDULENT CONVEYANCE. GUARANTY. INSURANCE AGAINST FIRE. LANDLORD AND TENANT. MARRIED WOMAN, 2. MORTGAGE. NOVATION OF CONTRACT. PAUPERS, 3. RATIFICATION. RESCISSION OF CONTRACT. SALE OF CHATTELS. TAX DEED.

1. By written contract, S. agreed to furnish the material and construct and set up in plaintiff's steam barge, then in construction, an engine and other machinery according to certain specifications, "the whole work to be completed, set up in barge, and ready for trial trip (*if vessel shall be ready for same*), by the first day of April, 1880." He further expressly agreed that if the barge should be ready and he should fail to so complete and set up said machinery by the first of April, he would pay such damages as plaintiff might suffer from such failure. In consideration of this undertaking, plaintiff agreed to pay a certain sum at the time of the execution of the contract, to make other payments at specified dates, and to pay the balance on full performance of the contract by S. *Held*, that if plaintiff failed to have its barge ready in season to enable S., with reasonable diligence, to have the machinery set up therein by the first of April, the latter was still bound to have it so set up within a reasonable time after the barge should in fact be finished; and would be liable to plaintiff for damages caused by his failure to do so. *Inter-Ocean Transp. Co. v. Sheriffs*, 202
2. A contract for the erection of a dwelling by T. for B., provides that T. shall complete it in all its parts "in a good, substantial and workmanlike manner, to the acceptance of W. D., architect;" that if a dispute shall arise respecting the true construction of the drawings or specifications, the same shall be finally decided by the architect, but if any dispute shall arise respecting the true value of any extra work, or of work omitted, "the same shall be valued" by arbitrators, whose appointment is provided for; and that the work is to be executed "so as to fully carry out the design for said building as set forth in the specifications or shown on the plans, and according to the true spirit, meaning and intent thereof, and to the full satisfaction of W. D., architect, . . . and to the satisfaction of the owner." *Held*, that the last provision has no reference to the quality of the workmanship or materials, and as to these, in the absence of proof of fraud, mistake or unfair dealing on the part of the architect, his acceptance of the work as satisfactory binds the owner. *Tetz v. Butterfield*, 242
3. In an action by the builder upon the contract, the answer alleges that improper and inferior material was used by the plaintiff; and that if the architect "has expressed satisfaction with said work, he has failed to discharge his duty as an architect, and has done so in fraud of the rights of defendant, and through some collusive arrangement, as defendant is informed and believes, between himself and the plaintiff." On the trial, defendant offered evidence to show that one of the floors was made of rotten flooring, and that much of the material used was rotten, etc., and that before plaintiff quit work, defendant notified him and the archi-

test that he (defendant) was not satisfied with the work and material. *Held*, that it was error to reject this evidence, as it tended to show *bad faith* on the part of the architect in accepting the building, and such proof was admissible under the contract and answer. *Ibid*.

4. An agreement between A. H. of the one part, and P. H., his wife, and the defendants of the other part, after reciting the permanent separation of A. H. and P. H., contains a covenant by A. H. with the second party that he will permit P. H. to reside in such place and family as she may from time to time choose; that he will, at the enrolling and delivery of said agreement, pay to defendants \$1,000, "in full for the support and maintenance" of P. H., "for her sole use and benefit forever;" that not more of said sum than \$125 shall be paid or expended by defendants to or for the use of P. H. in any one year, except in case of sickness, etc.; and that "all sums on hand and unexpended shall be kept on interest for the purpose of accumulating a capital for such use as is hereinbefore provided." The agreement then contains a covenant by the second party to "accept and take the said sum of \$1,000 in full satisfaction for the said P. H.'s support and maintenance," and also a covenant by defendants to indemnify A. H. against all claims of P. H. for dower, etc., and against her debts. *Held*,

(1) That P. H. (or her guardian for her, after his appointment) was at liberty, as against defendants, to select her place of residence, and defendants are bound to pay for her maintenance at such place to the extent provided in the agreement.

(2) That the defendants do not hold the \$1,000 as a trust fund chargeable only in equity, but are liable in an action *at law* upon their covenant for the maintenance of P. H.

(3) That under the well settled law of this state, such action upon defendants' covenant may be brought by any person who has furnished P. H. with maintenance, so far as the same was not furnished gratuitously. *Houghton v. Milburn et ux.*, 554

CONTRIBUTORY NEGLIGENCE.

See DAMAGES, 5. EVIDENCE, 3. RAILROADS, 9, 10.

CONVERSION.

See DEMAND. JUDGMENT (F.), 18.

CONVEYANCE.

See ASSIGNMENT, 4-6. CONFLICT OF LAWS. DEED. FRAUDULENT CONVEYANCE. MORTGAGE.

CORPORATIONS.

1. *Private Corporations.*

See NAVIGABLE RIVERS.

2. *Municipal Corporations.*

See CRIMINAL LAW, etc., 1. LICENSE LAWS.

3. *Other Public Corporations.*

See UNIVERSITY OF WISCONSIN.

COSTS.

See CHATTEL MORTGAGE, 5. FORECLOSURE OF MORTGAGE, 13. GARNISHMENT, 4. JUDGMENT (E.). WILLS, 2.

The reversal must be with costs against the respondent, notwithstanding his offer of a new trial in the court below, or of a reversal here without costs, as the appellants were entitled to a review by this court of the instructions. *Eriston v. Cramer et al.*, 220

COUNTERCLAIM.

See CHATTEL MORTGAGE, 6. FORECLOSURE OF MORTGAGE, 11. PLEADING, 2, 7.

In an action on a promissory note, against both the maker and the indorser, a separate judgment may be rendered between the plaintiff and each of such defendants, and either of the defendants may plead a counterclaim solely in his own favor. *Boyd v. Beaudin et al.*, 193

COUNTIES.

See HIGHWAYS, 2.

1. Where the county supervisors provide an office in the court house of the county for a county officer (in this case a county judge), if he takes and occupies an office elsewhere, he cannot recover from the county any moneys paid by him as rent therefor. *Waldo v. Manitowoc Co.*, 71
2. The term "unpaid taxes," in the statute regulating settlements between town and county treasurers (sec. 1114, R. S.), includes unpaid special assessments for street improvements; and that statute is applicable to the defendant city, under its charter (Laws of 1877, ch. 29, sections 10, 14), and R. S., sec. 4986. *Sheboygan Co. v. City of Sheboygan*, 415
3. Accordingly the defendant city is entitled to be credited by the county treasurer with the amount of special assessments for street grading, duly returned delinquent by the city treasurer. *Finney v. Oshkosh*, 20 Wis., 209, and *Jenks v. Racine*, 50 id., 318, distinguished. *Ibid.*

COUNTY BOARD.

See TOWNS.

Ch. 75, Laws of 1867 (Tay. Stats., ch. 13, § 62), gave the county board of supervisors power, "at the annual meeting in November," to determine the amount of the annual salary that should be received by the county treasurer who was to be elected in the county "during the ensuing year." Held, that the board might determine such amount at an *adjourned* session of such annual meeting, though held so late as March of the subsequent year, and that the salary of the treasurer elected at the following fall election would be limited by such determination. *Hull v. Winnebago Co.*, 291

COUNTY JUDGE.

See COUNTIES, 1.

COUNTY TREASURER.

See COUNTIES, 2, 3. COUNTY BOARD.

COURT AND JURY.

See BOUNDARIES OF LAND, 1 (3). DAMAGES, 5. FLOWAGE OF LAND, 2. INSURANCE, etc., 5. JUDGMENT (F.), 10, 14. NONSUIT. RAILROADS, 7, 10. VERDICT, 3.

1. Upon the evidence in this case, the questions of defendant's negligence and plaintiff's contributory negligence were for the jury, and not for the court. *Randall et al., Ex'rs, v. N. W. Telegraph Co.*, 140

2. Under our statute, the question of a fraudulent intent in the transfer of personal (as well as real) property, is one of fact for the jury. *Trowbridge v. Sickler*, 306
3. Whether the court would be authorized to take the question from the jury in any case, is not here decided, as there was evidence in this case to sustain the verdict upholding the transfer. *Ibid.*
4. If a question of fact should ever be taken from the jury on the mere testimony of experts (which is doubtful), at least this should not be done when there is any conflict in such evidence. *Spensley v. Lancashire Ins. Co.*, 433
5. It is error to submit to the jury a question of fact conclusively determined by the evidence, in which there is no conflict. *Town of Scott v. Town of Clayton*, 499
6. Defendant's fence between its track and plaintiff's pasture was swept away by a flood, which was at its height about eight days before plaintiff's horses were injured on said track. During the three days immediately preceding the injury, the water along the line of the fence had fallen at the rate of nearly eight inches each day; and at the time of the injury it had not subsided so as to leave the entire line of the fence at the place in question uncovered. The jury found that a new fence might have been properly and reasonably constructed two days before the injury. *Held*, that the court erred in submitting to them the question whether the defendant company was negligent in neglecting to rebuild the fence. *Goddard v. C. & N. W. Railway Co.*, 548
7. The court should not direct a verdict for the plaintiff, unless the evidence for the defendant, considering it as undisputed, and giving to it the most favorable construction in defendant's favor that it will legitimately bear, including all reasonable inferences from it, is insufficient to justify a verdict in defendant's favor. *Sabotta v. St. Paul F. & M. Ins. Co.*, 687
8. The written application for the fire-insurance policy here sued upon, contained covenants that the answers therein were true and were warranties on the part of the assured; and the policy purported to be issued partly in consideration of such warranties, and was conditioned to be void if the assured had made any false representations or concealments material to the risk or if he should assign the policy. There was evidence tending to show that the assured, in his application, falsely represented the incumbrances at much less than their real amount, and that he had assigned the policy before the loss. *Held*, that it was error to direct a verdict in his favor. *Ibid.*

CRIMINAL LAW AND PRACTICE.

1. When a city or village ordinance prohibits that which is a crime or misdemeanor and punishable at common law or by statute, and prescribes a penalty for its violation by fine, with imprisonment on default of payment, the action to recover such penalty is *quasi* criminal, and cannot be brought to this court on the plaintiff's appeal. *President, etc., of Platterville v. McKernan*, 487
2. Under sec. 4541, R. S., any person who is himself engaged in the business of a banker or broker in this state, and who receives money, paper circulating as money, or commercial paper, on deposit or for safe keeping, etc., when he knows or has good reason to know that he is "unsafe

or insolvent," is liable to be punished as provided in that section; and such liability is not confined to officers, clerks or agents of corporations or individuals engaged in such business. *Baker v. The State*, 368

3. Said statute is not in conflict with the 14th amendment of the federal constitution (which declares that "no state shall deny to any person within its jurisdiction the equal protection of the laws"), nor with any provision of our state constitution, but is valid. *Ibid.*

DAMAGES.

See EVIDENCE, 4, 5. FLOWAGE OF LAND, 1. PLEADING, 8. SLANDER, 4. TAX DEED, 5.

1. The complaint seeks a recovery for sickness and bodily and mental suffering of the plaintiff wife, and for mental suffering and expense and trouble on the part of the plaintiff husband growing out of the sickness of the wife, alleged to have been caused by the negligence of defendant's servants in directing plaintiffs to leave a train of passenger cars before they had reached their destination; and the action is held to be *in tort*, for the negligence, and not upon the contract of carriage, notwithstanding averments which show a contract relation between the parties, and that defendant "wholly disregarded its duty in the premises, and its contract and obligations to and with the plaintiffs." *Brown et ux. v. C., M. & St. P. Railway Co.*, 342
2. While the rule in actions for breach of contract is, that the damages recoverable are only such as the parties may reasonably be supposed to have contemplated as likely to result from such a breach, the general rule in actions for torts is, that the wrong-doer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him. *Ibid.*
3. The fact, therefore, that defendant's servants did not know the delicate state of health of the plaintiff wife at the time of the alleged wrong, does not relieve defendant from liability for the actual, direct consequences of such wrong. *Ibid.*
4. The direct or proximate consequences of a wrongful act are those which occur without any intervening *independent* cause; and the fact that the injuries chiefly complained of were caused *immediately* by the act of plaintiffs in walking from the place where they left the cars to the next station, will not relieve defendant from liability therefor, where it appears that plaintiffs' act in so walking was rendered apparently necessary by defendant's wrongful act, and was not negligent. *Ibid.*
5. The evidence in this case of subsequent negligence on plaintiffs' part, contributing to the injury, is not sufficient to warrant this court in reversing a judgment upon verdict in their favor. *Ibid.*
6. In an action for the breach of an executory contract to sell and deliver goods, the measure of damages generally is, the difference between the contract price and the market price of the goods at the time and place of delivery specified in the contract. But this rule is inapplicable where the purchaser could not go into the market at the agreed time and place for delivery, and obtain the goods. *Cockburn et al. v. Ashland Lumber Co.*, 619
7. The contract in this case requiring delivery of certain kinds of lumber in large quantities, by the defendant company to the plaintiffs, on defendant's docks at Ashland in this state at specified times, the court erred in admitting evidence for the defendant to show that plaintiffs could have

procured the lumber to be manufactured at some of the mills on the Wisconsin Central Railway between Ashland and Stevens Point — there being no evidence that plaintiffs had notice beforehand of defendant's intended default, or that *after such default* they could have procured at such mills lumber of the required kinds, and placed it in Ashland ready for shipment at the times and in the manner required by the contract. What the rule would be if they had had such notice, and could thus have supplied themselves, not considered. *Ibid.*

8. Plaintiffs in this case are entitled to recover such damages as did arise, and would naturally arise according to the usual course of things, from defendant's breach of contract, or such as may reasonably be supposed to have been in the contemplation of both parties when they made the contract, as the probable result of such a breach of it, but not such as arose from special circumstances under which plaintiffs entered into the contract, unknown to the defendant at that time. *Ibid.*
9. Thus, plaintiffs were entitled to show that the lumber purchased was intended for shipment to Q., and that this was known to defendant at the date of the contract; and thereupon their damages would be ascertained by adding to the contract price of the lumber at the agreed time and place of delivery, the cost of transporting it to Q. (including insurance), and the fees of inspection, and any other expenses usual and necessary in putting the lumber upon the market at Q., and deducting this amount from the market price at Q. at the time when it would have reached that place if there had been no breach of the contract. *Ibid.*

DEDICATION.

1. There cannot be a dedication to a limited portion of the public; and an acceptance by the public is necessary to a valid dedication. *Trerice et al. v. Barteau*, 99
2. Words purporting to grant a strip of land to a city, inserted in a deed to a third person of lots adjoining such strip, while of no effect as a conveyance to the city, may be evidence of the grantor's intent to dedicate such strip to the public. *Ibid.*
3. On the question whether a certain strip of land in a city is a public alley, evidence is admissible to show that such strip has been taxed by the city ever since its organization; that it has been sold by the county, with other lands, for taxes, and deeds given on such sales; that it appeared as an alley on none of the authorized maps of the city; that the city has never authorized or accepted the dedication; that the strip has never been used by the public, but only by the adjoining lot-owners; and that plaintiff went into possession of it more than ten years before the action, and fenced it in with her adjoining lot, has cultivated and built upon it, and has paid taxes upon it every year for about ten years, except when it was sold for taxes; such evidence tended strongly to show both a non-acceptance of the alleged dedication, and a title in plaintiff by adverse possession. *Lemon v. Hayden*, 13 Wis., 160, distinguished. *Ibid.*

DEED.

See BOUNDARIES OF LAND, 1. CONFLICT OF LAWS, DEDICATION, 2. EVIDENCE, 12. FORECLOSURE OF MORTGAGE, 7, 8. FRAUDULENT CONVEYANCE. HOMESTEAD LAW, 2. MARRIED WOMAN, 1. REFORMATION OF DEED. TAX DEED.

1. The certificate of acknowledgment of a deed is no part of its execution; and sec. 9, ch. 86, R. S. 1858, as amended by ch. 188 of 1859, did not

prescribe the form of a certificate of acknowledgment of a deed executed out of the state before a notary public, or require it to be made in accordance with the laws of the place where it was made; and such a certificate is sufficient where it would have been in substantial compliance with the laws of this state if made here. *Knight v. Leary*, 459

2. Where, therefore, a deed of substitution by an attorney in fact to convey land, was acknowledged before a notary public in the District of Columbia, and the notary's certificate failed to recite, as required by the laws of congress then in force in said district, that the grantor named in the deed was well known to him, or that his identity was proved, etc.: *Held*, that the certificate was sufficient. *Ibid*.
3. The fundamental rule in the construction of deeds is to so construe them as to give effect, if possible, to the grantor's intention. *Parkinson v. McQuaid*, 473

DEFINITIONS.

See HIGHWAYS, 1. INSURANCE, etc., 4. MORTGAGE, 1.

DEMAND.

1. Where property is taken from the owner's home and possession upon authority of his wife only, and there is no evidence of her authority as agent for her husband in that behalf, *quære* whether an action for the value of the property will not lie without any demand. *Ault v. W. & W. Manuf'g Co.*, 800
2. In such an action, an answer alleging title in defendant would, if standing alone, operate as a waiver of a demand; but if there is also a general denial, perhaps, on failure to show a *tortious* taking, it might be necessary for plaintiff to show a demand before suit brought. In this case, however, a demand was conclusively proven. *Ibid*.

DEMURRER.

See LIMITATION OF ACTIONS, 2.

The joinder of a party as plaintiff who has no interest, is not ground of demurrer. *Boyd v. Beaudin et al.*, 193

DEPOSITION.

See EVIDENCE, 7, 13.

DISTRIBUTION.

See ESTATES OF DECEDENTS, 3-5.

DIVORCE.

1. In a divorce suit by the wife, an order refusing to allow an amendment of the complaint making a third person a defendant on the ground that the principal defendant had conveyed to him a part of his real estate with intent on the part of both to defraud plaintiff of a proper provision for her support, etc., is affirmed because it is not shown that there was any intention to prejudice plaintiff's rights, or that they will be prejudiced, in fact, by the conveyance. *Damon v. Damon*, 23 Wis., 510, distinguished. *Varney v. Varney*, 422

2. Under sec. 2361, R. S., the circuit court in a suit by the wife for divorce has power, upon rendering judgment dismissing the complaint (as well as before judgment), to order the husband to pay such sum as in its discretion it deems necessary to meet the expenses of the prosecution of the suit. *Sumner v. Sumner, imp.*, 642
3. Where it appeared that neither party had been blameless in the treatment of the other; that the husband had on several occasions used harsh and insulting language towards the wife; that he advised her to obtain a divorce, under an erroneous impression as to the law; and that plaintiff prosecuted the action in good faith, believing that she had good cause for a divorce: *Held*, that there was no abuse of discretion in requiring the defendant to pay the actual and necessary disbursements of plaintiff's attorney in prosecuting the action, and reasonable fees therefor. *Ibid.*

DOWER.

See ESTATES OF DECEDENTS, 1, 2, 4.

A certain report of commissioners appointed to admeasure plaintiff's dower, etc. (which was confirmed by the court), construed as an assignment of parcel *x* as dower, and of parcel *y* as homestead. *Durkee v. Felton, imp.*, 405

EJECTMENT.

See ADVERSE POSSESSION.

In ejectment, proof that defendant claimed to have a deed of the premises, and assumed a right to lease them and to collect the rents and retain them to his own use, at least *tends* to show an *ouster* of the plaintiff. *Durkee v. Felton, imp.*, 405

EQUITY.

See CHATTEL MORTGAGE. FORECLOSURE OF MORTGAGE, 9-13. FRAUDULENT CONVEYANCE. JOINDER (B.). REFORMATION OF DEED. REFORMATION OF LEASE. TENANTS IN COMMON, 2.

ESTATES OF DECEDENTS.

See GARNISHMENT, 2.

1. Since the territorial statutes of 1839, the statutory rule in this state has been, that a testamentary provision for the widow was presumptively *in lieu* of dower, unless the will itself showed plainly that such provision was *in addition* to dower. *Hardy et al. v. Scales et al.*, 452
- [2. Whether, under sec. 18, ch. 89, R. S. 1858, a provision in the will, not renounced by the widow, excluded her from dower in real estate *not disposed of* by the will, is not here decided.] *Ibid.*
3. Prior to ch. 106 of 1877, the widow took her share of the *personal* property under the statute of distributions, unless excluded by the will itself, without being compelled to make her election. *Ibid.*
4. Under ch. 106 of 1877, where a will makes provision for the widow, she is excluded from any share of *either the real or the personal estate* of the testator, left undisposed of by the will, by virtue of the right of dower or under the statute of distributions, unless she duly renounces the provision so made for her in the will. *Ibid.*

5. The statute of 1877 repeals by implication subd. 6, sec. 1, ch. 99, R. S. 1858. *Ibid.*

ESTOPPEL.

See GARNISHMENT, 1. PARTNERSHIP, 1.

EVIDENCE.

See BOUNDARIES OF LAND, 1 (1), 2. CONTRACTS, 3. COURT AND JURY, 4. DEDICATION, 2, 3. EJECTMENT. FORECLOSURE OF MORTGAGE, 2. FRAUD, 1. GARNISHMENT, 1. LIBEL, 1. LICENSE, 1. SLANDER, 3. TAX DEED, 1, 2. TRUSTS.

1. In an action for injuries from defendant's negligence in permitting its telegraph wires to be down and lying across a highway at a certain spot, proof that defendant's poles and wire were down at other places, within a few miles of the place of the injury, and at other times, within a few months of the time of the injury, *would seem* to be admissible to show defendant's negligence. *Randall et al. v. N. W. Telegraph Co.*, 140
2. An admission by the defendant company's general agent, after the injury was received, that defendant was liable therefor, was not admissible in evidence; and a judgment for plaintiff is reversed for its admission against a sufficient objection to its competency, the court not being able to say that defendant was not injured thereby. *Ibid.*
3. It is the settled rule in this state, that contributory negligence is purely matter of *defense*, and the burden of proof in relation thereto upon the defendant; and where evidence introduced by the plaintiff tends to show contributory negligence, while defendant may avail himself of such evidence, the burden of proof is not shifted thereby. *Ibid.*
4. In an action for personal injuries to the plaintiff, which disqualified him to give his personal attention to the business which he had previously carried on, where such business consisted in the manufacture and sale of patented and other machines, it was error to admit proof of the average profits of his business while he carried it on, as a basis for estimating his damages, such a basis being of too uncertain and speculative a character. *Bierbach v. Goodyear Rubber Co.*, 208
5. Under a general allegation in the complaint that, by reason of the injuries complained of, plaintiff has been unable to attend to his ordinary business, he may prove what his business is, and the damages he has suffered by reason of his inability to pursue it. *Luck v. Ripon*, 52 Wis., 196. *Ibid.*
6. It is error to charge the jury that, "if the witnesses are equally credible, and they so present themselves to the mind of the jury, then the greater number of witnesses on one side or the other would be entitled to the greater weight." *Ibid.*
7. In the case of a deposition taken on oral interrogatories, upon notice, where the party in whose behalf cross interrogatories are to be put is not represented by attorney, but depends upon written interrogatories sent to the examining officer, the mere fact that some of the cross interrogatories are somewhat evasively or not fully answered, by reason of the neglect of such officer to press vigorously for full and exact answers, is not sufficient ground for *suppressing the deposition*; but this rule will not prevent the *striking out of an answer* which is not responsive or is purely evasive. *Trowbridge v. Sickler*, 306

8. In replevin, a witness may properly testify that a particular person was "in possession" of the property at a specified time; and it is for the adverse party, by cross examination, to ascertain what facts within the witness's observation were regarded by him as constituting such "possession." *Ibid.*
9. If the record in the office of a register of deeds of a county in this state, of a certified copy of the records of a U. S. land office in the state, is evidence of the entries of land therein stated, still such record will be controlled by a certified copy of such land office records, introduced in evidence, and showing error in the registry. *Knight v. Leary*, 459
10. The evidence in this case, in reference to the original entry by C. of land under a land warrant, including the certificate of the location of such warrant, issued by the land office at the time, the proper monthly abstract of locations made at said office, and the patent issued by the United States upon such entry — held to show conclusively that the entry did not cover the land here in dispute, notwithstanding a subsequent unexplained alteration of the entry upon the books of the office, and the record of the entry as so altered in the office of the register of deeds of the county. *Ibid.*
11. In the absence of evidence explaining the alteration in such entry, or showing that C. ever purchased, paid for or located the land here in dispute, or acquired any interest therein from the government, the alteration is held inoperative for any purpose. *Ibid.*
12. Where a patent of land from the United States recites that the patentee's claim thereto "has been established and duly consummated in conformity to law," and that the instrument was issued pursuant to certain specified acts of congress, it must be *presumed that such recitals are true*, if there is any method by which, consistently with the law and the facts in proof, a valid entry of the kind could have been made by the patentees. *Ibid.*
13. In case of a deposition taken without the state before a notary public, under sec. 4112, R. S., the certificate of such notary need not have attached thereto any certificate of his official character. Sec. 4203, R. S., has no reference to such depositions. *Hayes v. Frey et al.*, 503
14. Portions of medical books cannot be read to the jury as evidence, although such books have been shown by expert testimony to be "standard works in the medical profession." *Stilling v. Town of Thorp*, 528

EXCUSABLE NEGLECT.

See APPEAL (A.), 2.

EXECUTION.

See INSURANCE, etc., 1, 2.

EXEMPTION.

See HOMESTEAD.

EXPERT TESTIMONY.

See, COURT AND JURY, 4. EVIDENCE, 14.

FINDINGS OF FACT.

See FORECLOSURE OF MORTGAGE, 9, 11, 12. FRAUD, 2, 8. JUDGMENT (F.), 5, 12.

FLOWAGE OF LAND.

1. A company which has constructed works (in this case a boom) in a public river, in a proper manner and by authority of the legislature, is not liable for damages for flowage of land caused by an extraordinary freshet such as the company could not reasonably have anticipated and provided against, even though such damages may have been to some extent occasioned by the presence of such works in the river. *Borchardt v. Wausau Boom Co.*, 107
2. The question whether in a given case the freshet causing the danger was of such unusual and extraordinary character as to excuse a party from foreseeing and providing against it, is for the jury under proper instructions. *Ibid.*

FORECLOSURE OF MORTGAGE.

See JOINDER (B.). RES ADJUDICATA, 2.

1. No valid foreclosure of a mortgage of land by virtue of a power of sale without suit expressed in the instrument, could be had under ch. 154, R. S. 1858, unless proceedings were taken in substantial compliance with that statute. *Hayes v. Frey et al.*, 503
2. The party who, in subsequent litigation, relies upon a foreclosure sale under a power, is not bound to show in the first instance that no action or proceeding had been instituted at law to recover the mortgage debt; but one who seeks to invalidate the sale has the burden of proof in that respect. *Ibid.*
3. The executor of a deceased mortgagee, acting under letters testamentary duly granted in another state, may execute a power of sale in the mortgage, of land in this state, without having the will probated here; and, prior to ch. 20 of 1869, he might do so without filing a copy of his letters testamentary in any public office in this state. *Hayes v. Lienlokken*, 43 Wis., 509, distinguished. *Ibid.*
4. The executor in this case was also made by the will a residuary legatee, but there were special money bequests to other persons and no special bequest of the note and mortgage here in question to the executor. *Held*, that he took the property in the first instance as executor, and not by "assignment" within the meaning of ch. 154, R. S. 1858. *Ibid.*
- [5. The effect of ch. 20 of 1869 (now sec. 3267, R. S.), somewhat considered by TAYLOR, J. But that statute was not in force when the proceedings by the executor here in question were had.] *Ibid.*
6. The validity of a sale under a power in a mortgage is not affected by the fact that the statute of limitations had run upon the note secured by the mortgage. *Ibid.*
7. The fact that the certificate of such a sale recited that a deed would not be issued until *two years* (instead of one) after the sale, does not invalidate a deed issued after the two years had expired; and a failure to attach a seal to the certificate is not a fatal defect. *Ibid.*
8. Under sec. 12, ch. 154, R. S. 1858, the deed of land sold at such a sale may be executed either by the officer who made the sale and whose term has expired, or by his successor in office. *Ibid.*

9. By the terms of a mortgage given to secure payment of purchase money amounting in all to \$2,950, \$100 were to be paid at once; the mortgagor was to pay all incumbrances then existing upon the property, and be credited with one-half the amount; and the remainder was to be paid in installments. In an action brought some years afterwards, the complaint alleged that there was due and unpaid on the mortgage a balance of \$2,000, and the answer, without expressly denying this averment, alleged that defendant had paid, before the commencement of the action, incumbrances amounting to about \$4,000, one-half of which should be allowed as a payment on the mortgage. There was no pretense of any other payments, except the \$100. The court found as a fact that there was due on the mortgage \$2,128. *Held*, that this sufficiently disposed of the issue as to the amount of payments made by defendant to discharge incumbrances. *Wylie v. Karner*, 591
10. Under the terms of the mortgage as above stated, the mortgagor was entitled to credits for one-half of the sums paid by him upon the amount of incumbrances existing *at the time of the sale*, but not for any part of sums paid by him for subsequently accrued interest on such incumbrances. *Ibid.*
11. The answer also alleged damage to defendant from false representations by the vendor at the time of the sale; but did not allege that the vendor *knew* the representations to be false, nor did it plead the facts as a counterclaim. The court found that the vendor *warranted* the property free from defects, and that there was a defect, to defendant's damage in a certain amount, which was deducted in the judgment. *Held*, on defendant's appeal, that there was no error as against him; that, even if that part of the answer which relates to the alleged false representations could properly be treated as in form a counterclaim, it does not state a cause of action; and that, if it were otherwise, the issue was sufficiently disposed of by the finding and judgment. *Ibid.*
12. The answer alleged that the property mortgaged was personal and not real property, and also set up certain alleged facts as estopping plaintiff from claiming that the mortgage was of realty. The mortgage was of an undivided half of a certain steam saw-mill, situate on a certain lot, and of the tools, implements and fixtures connected with such mill; and the court found that the mill still remained on said lot, and was "a stationary mill, set in brick arches on said land;" and it rendered judgment of foreclosure and sale in the manner prescribed for real-estate mortgages. *Held*, that at least some part of the property was virtually found to be real estate; and that, even if it were all personal property, there would be no error in the judgment injurious to the mortgagor. *Ibid.*
13. Judgment in foreclosure can allow no sum as attorney's fees in addition to statutory costs, unless such sum is stipulated for in the mortgage. *Ibid.*

FRAUD.

- See CHATTEL MORTGAGE, 9. CONTRACTS, 3. COURT AND JURY, 2, 3: FORECLOSURE OF MORTGAGE, 11. FRAUDULENT CONVEYANCE.
1. One who impeaches a mortgage as in fraud of creditors, has the burden of showing the fraud by clear and satisfactory evidence. *Rice v. Jerenson*, 243
 2. To justify this court in reversing the finding of the court below on the issue of fraud, there should be a clear preponderance of the evidence against such finding. *Ibid.*

3. Upon all the evidence in this case (stated in the opinion) this court declines to reverse the finding of the court below that the mortgage here in question (upon a stock of goods) was given without any fraudulent intent as to creditors, notwithstanding several facts which are grounds of suspicion and usually indications of bad faith. *Ibid.*
4. The mere purchase of land with knowledge that a person is in possession claiming title adverse to that of the vendor, in good faith, and has paid for the land, is not a fraud in the law. *Knight v. Leary*, 459
5. An intent to defraud cannot be inferred from the mere fact that a debtor made a general assignment for the benefit of creditors, or that he preferred some of his creditors to others, or that he turned out property in payment of certain creditors after an attachment had been levied in favor of another creditor, and before executing his general assignment. *Lord v. Devendorf, imp.*, 491

FRAUDULENT CONVEYANCE.

1. To avoid a sale as in fraud of creditors, both parties to it must be connected with the fraudulent design. *Mehlhop v. Pettibone et ux.*, 652
2. Where lands are exchanged, and one of the deeds is adjudged void as to the grantor's creditors, this does not affect the validity of the other deed. *Ibid.*
3. The defendant wife having conveyed her own land in Iowa (which was the homestead) to the defendant husband, by a valid deed, and taken from him in exchange a deed of Wisconsin land (whose value is not shown), and there being no evidence that she knew of her husband's insolvency or indebtedness, a judgment avoiding the deed to her, in favor of his creditors, is reversed for want of sufficient proof of fraud on her part. *Ibid.*
4. Whether the value or proceeds of the Wisconsin land could be followed by the husband's creditors in a court of equity, and made a charge upon the Iowa lands, not considered. *Ibid.*

GARNISHMENT.

1. The mere facts that, during the pendency of an action for a money judgment by plaintiffs against T., B., knowing that plaintiffs were making the inquiry with a view to determining whether they should garnish him, admitted an indebtedness on his part to T., and that plaintiffs were thus induced to commence garnishment proceedings against him, do not estop him from afterwards denying the existence of such indebtedness; though such admission is evidence for the jury as to the fact of indebtedness. *Warder et al. v. Baker, Garnishee, et al.*, 49
2. An executor or administrator is not subject to garnishment before a final order for the distribution of the estate is made; and where he is summoned as garnishee before the making of such order, judgment cannot be taken against him therein *after* the order is made. Whether he is subject to garnishment after such final order, is not here determined. *J. I. Case T. M. Co. v. Miracle, Ex'r, Garnishee*, 295
3. Where a person whom a garnishee's answer discloses as a claimant of the fund in dispute, has been ordered to interplead (R. S., sec. 2767), and has answered setting up his claim, and the plaintiffs have taken issue on

the answer, and gone to trial thereon, they cannot afterwards object that the answer is unverified or out of time. *Kirby et al. v. Corning, Garnishes, et al.*, 599

4. It having been found that part of the fund in the garnishee's hands belonged to the principal debtor, and another part to the person required to interplead, judgment properly goes in favor of the latter against the plaintiff, for costs. *Ibid.*
5. Where the court orders the garnishee to pay over to such party interpleading so much of the fund as is adjudged to belong to him, the question whether this is a proper order will not be considered on the plaintiff's appeal. *Ibid.*

"GOOD FAITH."

See MORTGAGE, 1.

GUARANTY.

By contract between G. and plaintiff, G. was to have the *exclusive* right in certain places to sell harrows bought by him of plaintiff, and was to pay plaintiff for harrows so purchased either "by cash or note due July 1, 1879, with privilege of five months' extension, if desired, with ten per cent. interest." B guaranteed payment by G. for all purchases made by him under such contract, and payment of all notes "or renewals thereof," made by G. in pursuance of the contract. Afterwards, by a written addition to the contract with G., made without the knowledge of B., plaintiff gave him the privilege of selling harrows at a certain other place named. G. sold harrows at such other place, and gave his note for the amount due plaintiff therefor, payable *on or before* November 1, 1879, with interest after July 1, 1879, at ten per cent. In a suit on such note, *Held*,

1. That the liability of B. as surety was not affected by the additional agreement between G. and plaintiff as to the *place* of sale.

2. That there is no *material* difference between the form of the note in suit, given by G., and that described in the contract; and the surety is liable thereon. *Fond du Lac Harrow Co. v. Bowles, imp.*, 425

HIGHWAYS.

See INSTRUCTIONS TO JURY.

1. In sec. 1227, R. S. (which requires, under a penalty for neglect, the erection of guide-boards at certain points), the words "legally laid out roads" apply only to roads laid out by the authorities in accordance with the statute upon that subject, and not to roads which have become such by mere use or dedication. *State et al. v. Siegel*, 86
2. Under our statute (sec. 1339, R. S.), a town is relieved from liability, and the county is liable, for damage caused by the defective condition of a highway, only where such highway has been "adopted" as part of a county highway, under sec. 1308, R. S., and not in cases where a road has been merely "laid out" by the county board, under secs. 1300-1307. *Stilling v. Town of Thorp*, 523

HOMESTEAD.

See DOWER.

The statute (R. S., sec. 2983) which provides that the exemption of a debtor's homestead shall not be impaired by a sale thereof, but "shall extend to proceeds derived from such sale while held with the intention to

procure another homestead therewith, for a period not exceeding two years," does not require, as a condition of such exemption, that the debtor shall continue to reside in this state during the two years, nor that he shall intend to procure another homestead in this state. *Hewett v. Allen*, 583

HOMESTEAD LAW (FEDERAL).

1. Under the act of congress approved April 4, 1872 (now found as sec. 2306, R. S. of U. S., any person of certain described classes who had theretofore entered, under the homestead law, a quantity of land less than 160 acres, was permitted to enter enough additional land to make up the full quantity of 160 acres, *without residing* upon such additional tract. The tract here in question being only forty acres, and plaintiff's grantor having received a patent therefor containing the recitals above described, and being shown never to have resided upon said land, it is presumed (in the absence of evidence to the contrary) that he acquired a right to enter it under the acts just mentioned. *Knight v. Leary*, 549
2. One who has entered land under the homestead law may alienate it before the patent issues, in the absence of anything in the statute forbidding such alienation; and the patent, when issued to him, will vest the title in his previous grantee by deed of warranty. *Ibid.*

HUSBAND AND WIFE.

See DEMAND, 1. DIVORCE. MARRIED WOMAN.

INSTRUCTIONS TO JURY.

See AGENCY. BOUNDARIES OF LAND, 3. EVIDENCE, 6. JUDGMENT (F.), 2-4, 6, 13, 14. SLANDER, 4.

The question whether there was error in giving or refusing certain instructions, must be determined by a consideration of the facts in evidence to which they related, and not merely of their accuracy as abstract propositions of law. And where the bridge whose defective condition is alleged to have caused an injury complained of, was only twelve feet wide, and sloped southward so as to be four inches lower on the south than on the north side, and the ice was much thicker and rougher on the northern than on the southern side, there was no error in refusing to charge that "the mere slippery condition of the bridge, arising from the ordinary action of the elements (as ice and snow) is not such a defect as would render the town liable," or in charging that, if the ice rendered the highway insufficient, the town was bound to restore it to a reasonably safe condition within a reasonable time. *Stilling v. Town of Thorp*, 528

INSURANCE AGAINST FIRE.

1. A provision in a fire-insurance policy that the "levy of an execution" on property insured shall terminate the risk, is applicable only to *personal* property, there being in practice no *levy* of an execution on real estate. *Hammel v. Queen's Ins. Co., etc.*, 72
2. Such a policy provides for an immediate termination of the risk "if the property be sold or transferred, or any alienation or change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance." Under the laws of this state the original owner of land, his heir or assignee, has full rights of possession,

occupancy and use for fifteen months after the sale of the land on execution; for twelve months of that time he has an absolute right to redeem, and, on his failure to do so, other judgment creditors or mortgagees may redeem within the next three months; and the purchaser at execution sale can acquire, as such, neither title nor possession before the end of the fifteen months. *Held*, that an execution sale of realty is in itself no ground of forfeiture under the condition above recited. *Ibid*.

3. The policy here sued on, insuring against "all loss or damage by fire" to the property described, expressly declares the insurer liable "for any loss or damage caused by lightning." *Held*, that this language covers all known effects of lightning, and not merely those arising from combustion. *Spensley v. Lancashire Ins. Co.*, 433
4. The word "lightning," in its ordinary and popular sense, applies to any sudden and violent discharge of electricity, occurring in the course of nature, between positively and negatively electrified bodies, usually developing in its course the phenomena of light, heat and disruptive force. *Ibid*.
5. The property insured was destroyed by a *tornado*; and this court is of opinion that the plaintiff's evidence (largely set out in the opinion) so tended to show the presence in the tornado of electrical disturbance presenting the usual characteristics of lightning in the ordinary sense of that word, and that such lightning was an active agent in destroying the property insured, that it was error to order a nonsuit. *Ibid*.

INTERPLEADER.

See GARNISHMENT, 3-5.

JOINDER.

(A.) *Of Parties.*

See DEMURRER.

(B.) *Of Causes of Action.*

An action against A. and B., who are husband and wife, and X., who holds a mortgage of land from B., to have a prior deed from A. and B. to plaintiff, absolute on its face, declared a mortgage, to have a subsequent recorded deed purporting to have been executed by plaintiff to B., conveying to her the same land, set aside as a forgery, and to have plaintiff's mortgage foreclosed against all the defendants, does not improperly unite different causes of action. *Moon v. McKnight, imp.*, 551

JUDGMENT.

(A.) *Form of Judgment.*

See MUNICIPAL COURT OF DANE COUNTY, 2.

(B.) *Separate Judgment as to one defendant.*

See COUNTERCLAIM.

(C.) *Judgment for debt not due.*

See ATTACHMENT, 1.

(D.) *When Judgment Void.*

See APPEAL (C.).

(E.) *Modifying Judgment after term.*

This court has no power to modify its own judgments as to costs, rendered at a former term, as by changing it from a judgment against the plaintiff (who brought the suit in his official capacity upon an assignee's bond) to a judgment against the person for whose benefit the suit was brought. *Boland, Clerk, etc., v. Benson et al.*, 387

(F.) *Reversal of Judgment.*

See COSTS. DAMAGES, 5. EVIDENCE, 2. FORECLOSURE OF MORTGAGE, 12. FRAUD, 2, 3. SLANDER, 3.

1. Where a plaintiff is granted all the relief which he demands, or to which he is entitled, he cannot complain because it is granted upon grounds different from those for which he contends. *Mowry v. First National Bank, etc.*, 38
2. Where an instruction asked, which, though not in the best form, defines the law with substantial correctness, is rejected, and no correct instruction upon the same point is given, this is error, if prejudicial to the appellant. *Borchardt v. Wausau Boom Co.*, 107
3. A mere instruction to the jury that such admission of the agent was not *conclusive* against the defendant company, was not a sufficient withdrawal of the evidence from the consideration of the jury; and the fact that such instruction was given at defendant's request after its objection to the evidence had been overruled, will not cure the error of the court in admitting the evidence. *Randall et al. v. N. W. Telegraph Co.*, 140
4. A judgment will be reversed for an erroneous instruction, notwithstanding the fact that correct instructions in a contrary sense were also given, where this court is not satisfied that the appellant was not injured by the error. *Ibid.*
5. Findings of fact by the trial court will not be reversed on appeal except upon a clear preponderance of evidence. *James v. Cutler*, 172
6. Where the instructions given are not incorrect, a mere omission to give a more definite instruction to which the appellant might have been entitled, but which he did not ask for, is not ground for reversal. *Troubridge v. Sickler*, 306
7. It is discretionary with the trial court whether it will permit the jury, on motion of a party, to view premises or property; and its determination on that point will not be reviewed on appeal. *Boardman et al. v. Westchester Fire Ins. Co.*, 364
8. If the jury are guilty of any misconduct in making the view, or the court errs in instructing them as to the effect they may give to matters which have fallen under their observation while making it, the appellant must cause such misconduct or such erroneous instruction to appear by the bill of exceptions. *Ibid.*
9. What was said by counsel by way of argument to induce the court to order a view to be taken by the jury, cannot be alleged for error. *Ibid.*
10. A judgment upon verdict will not be reversed upon the weight of evidence, where there is evidence sufficient to support the verdict. *Powers v. Dellinger*, 389
11. A judgment upon verdict against defendant for the value of the whole of certain chattels is reversed for want of any evidence of defendant's liability as to a part of the chattels. *Ibid.*
12. There was in this case no such clear preponderance of evidence against the finding of facts by the court below (in favor of the assignment) as would warrant this court in reversing the decision of that. *Lord v. Desendorf, imp.*, 491

13. Upon a second trial of this cause, the circuit judge stated to the jury his own view of the law, which had been overruled by this court on a former appeal (51 Wis., 185); but afterwards directed the jury to disregard his opinion, and determine the question at issue from the evidence as applicable to the law. This court, being of opinion, from the whole record, that this statement of the law as previously held by the circuit judge may have misled the jury, treats it as error. *Town of Scott v. Town of Clayton*, 499
14. The court having submitted to the jury a question of fact conclusively determined by the evidence, in which there was no conflict, this is also held to be error. *Ibid.*
15. A judgment will not be reversed for the improper admission of evidence, which, in view of the other evidence in the case, could not have affected the verdict. *Stilling v. Town of Thorp*, 523
16. A judgment will not be reversed for improper remarks made by the respondent's attorney to the jury, where there is no reason to believe that the verdict was influenced by them to the appellant's injury. *Tucker v. Cole et al.*, 539
17. An error in rejecting testimony is cured where the testimony is afterwards admitted in full, and the erroneous rejection of evidence is no ground of reversal unless the appellant may have been prejudiced thereby. *Kirby et al. v. Corning, Garnishee, et al.*, 599
18. Where the plaintiff in an action for the conversion of chattels has shown no title to the property, a judgment against him will not be reversed for any error in the charge or rulings of the court. *Galloway v. Week et al.*, 604
19. The judgment of the circuit court affirming the judgment of a justice's court (where there was no trial *de novo*) affirmed here on the ground that there was evidence to sustain it. *Lyle v. Dellinger*, 404

JURISDICTION OF Circuit Court.

See APPEAL (C.).

JUSTICE OF THE PEACE.

See MUNICIPAL COURT OF DANE COUNTY.

LANDLORD AND TENANT.

See REFORMATION OF LEASE.

1. Where, after the expiration of his term, one who has been in possession as a lessee, is permitted by a subsequent lessee to remain in possession until the latter shall notify him to remove, he is a tenant at will, and is the only person who can bring trespass *quare clausum* for an unlawful entry on the premises by a third person. *Gunsolus et al. v. Lormer et al.*, 630
2. The provision of section 4216, R. S., that the possession of the tenant shall be the possession of the landlord, until, etc., merely prevents the tenant, holding over, from claiming possession *adversely* to his landlord. *Ibid.*

"LEGALLY LAID OUT ROAD."

See HIGHWAYS, 1.

LEGISLATURE.

See CONSTITUTIONAL LAW.

LEVY OF EXECUTION.

See INSURANCE, etc., 1.

LIBEL.

1. Under our statute relating to actions for libel, where the publication is *prima facie* libelous, facts and circumstances tending to overcome or lessen the presumption of malice, if properly pleaded in mitigation of damages, may be proved; and this though the truth of the publication has also been alleged in *justification*. *Eviston v. Cramer et al.*, 220
2. A special verdict to the effect that the publication complained of was false, but defendant did not publish it "with intent to injure plaintiff's feelings and degrade him in the estimation of the public," does not negative all malice, and therefore does not cure the error of the court in excluding evidence in mitigation of damages. *Ibid.*

LICENSE.

See RAILROADS, 2.

1. In an action for a trespass to land, if defendant relies upon a license, it must be specially pleaded, and cannot be given in evidence under the general issue; but it is sufficient if the facts constituting the license are averred. *Lockhart v. Gier et al.*, 133
2. A mere license may be by parol, and is a defense as to all acts embraced within its terms, committed before its revocation; but the commencement of an action for damages by the licensor is a revocation. *Ibid.*

LICENSE LAWS.

The general law of this state on the subject of licensing the sale of intoxicating liquors, and making their unlicensed sale punishable as a misdemeanor (first enacted as ch. 179 of 1874), operated to repeal the provisions of then existing municipal charters upon that subject, excepting in the three particulars expressly excepted by the statute, to wit: the disposal of license moneys, the term of license and the jurisdiction of municipal courts. *President, etc., of Platteville v. McKernan*, 487

"LIGHTNING" defined.

See INSURANCE, etc., 4.

LIMITATION OF ACTIONS.

See FORECLOSURE OF MORTGAGE, 6. TAX DEED, 2-4.

1. Sec. 7, ch. 334 of 1873, which limited the time for bringing an action to cancel tax certificates *theretofore issued* to nine months from the time when that act took effect, continued applicable to those cases after the enactment of the present revision, though omitted therefrom. [See secs. 4221 and 4976, R. S.] *Clarke v. Lincoln Co.*, 578
2. A demurrer and an answer to a complaint in such an action on the ground "that the action was not commenced within the time limited by law by sec. 7 of chap. 334 of the laws of Wisconsin for 1873," held to contain a sufficient reference to the statute, under sec. 2651, R. S. *Ibid.*

3. Where the original complaint in an action sets forth a fact as having occurred on a specified day, the presumption is that the action was not commenced before that day. *Ibid.*
4. Sec. 7, ch. 334, Laws of 1878, which limited the right of action to set aside tax sales, or cancel tax certificates, to a period of nine months from the date of the sale or certificate, etc., was valid. *Clarke v. Lincoln Co.*, 580

MALICE.See **LIBEL**.**MANDATORY STATUTE.**See **TOWNS**.**MARRIED WOMAN.**See **DEMAND**, 1.

1. Sec. 12, ch. 59, R. S. 1849 (which required a married woman's acknowledgment of a deed executed by her jointly with her husband to be taken separately, etc.), was repealed by sec. 2, ch. 229, Laws of 1850; and it was impliedly repealed as to all real estate conveyances made by a married woman of her separate estate, by sec. 3, ch. 44, Laws of 1850. *Hayes v. Frey et al.*, 503
2. Where a certain sum of money was paid to a husband and wife, and in consideration thereof they covenanted to support and maintain one X. during the remainder of her natural life: *Held*, that the wife's interest in the sum so paid is her separate estate, and she is liable upon the covenant as well as her husband. *Houghton v. Milburn et ux.*, 554

MASTER AND SERVANT.See **RAILROADS**, 4, 7, 8.**MEASURE OF DAMAGES.**See **DAMAGES**, 1-4, 6-9. **EVIDENCE**, 4. **PLEADING**, 8. **SLANDER**, 4. **TAX DEED**, 5.**MEDICAL BOOKS.**See **EVIDENCE**, 14.**MORTGAGE.**See **CHATTEL MORTGAGE**. **FORECLOSURE OF MORTGAGE**. **FRAUD**, 1-3.

1. The term "conveyance" in the recording act (sec. 2241, R. S.; sec. 25, ch. 86, R. S. 1858) includes a mortgage; and one who purchases with knowledge of an outstanding incumbrance, or information sufficient to put him on inquiry, is not a purchaser in "good faith," within the meaning of that statute. *Rowell et al. v. Williams, Adm'x, et al., imp.*, 636
2. Upon the evidence in this case (stated in the opinion) the court below was justified in holding that plaintiffs took their mortgage in suit with notice of the rights of previous mortgagees, notwithstanding errors in the record of the previous mortgages. *Ibid.*
3. Persons owning and occupying the west half and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of a certain section, and intending to mortgage the whole 120 acres, by mistake described the first eighty as the west half of the E. $\frac{1}{4}$, and the mortgage was so recorded; but it recited that it was upon 120 acres. The mortgagors did not own the S. E. $\frac{1}{4}$ of the section. *Held*, that the land described was capable of being made certain by

.proof, and the mortgage was good as between the parties, and as to them and subsequent mortgagees with notice must be deemed to cover the 120 acres owned by the mortgagors in the N. E. quarter section.

Ibid.

4. A mortgage which recites that it was given to secure a promissory note of the mortgagor, *held* to show a consideration. *Ibid.*
5. Whether the omission of the name of the county in the venue of the acknowledgment of a mortgage prevents the record thereof from being constructive notice to a subsequent *bona fide* purchaser, was immaterial in this case. *Ibid.*

MUNICIPAL COURT OF DANE COUNTY.

1. Where cases cognizable by a justice of the peace are brought in the municipal court of Dane county, the judge thereof must act as such a justice; and an appeal from his judgment must be taken in the same manner as from a justice's court. *Gunsolus et al. v. Lormer et al.*, 630
2. On such an appeal, where there is no new trial in the circuit court, the judgment of that court must be one of affirmance or reversal (in whole or in part), and not an ordinary judgment for one of the parties. *Ibid.*

NAVIGABLE RIVERS.

See FLOWAGE OF LAND.

1. The plaintiff corporation has no right to charge tolls upon logs run or driven upon the Black river (a navigable stream), unless such right is conferred upon it by statute. *Black River Flooding-Dam Asso. v. Ketchum et al.*, 313
2. Chapter 86, R. S., under which the plaintiff was organized, did not affect in any way the authority previously granted the Black River Improvement Company to improve said river throughout its whole length, and to charge tolls on logs, etc., transported therein (which grant included the right to erect flooding dams). *Ibid.*
3. Said improvement company having taken and retained possession of at least a part of said river for the purpose of improving its navigability, the plaintiff company did not and could not thereafter take any authority, under the terms of said chapter 86, to improve *any part* of the same stream (as by its flooding dams), and charge tolls therefor. *Ibid.*
4. Plaintiff's charter empowers it "to improve the navigation of the Black River and lakes near the mouth" thereof, in counties named, "by removing obstructions, *building dams*, breaking jams, deepening, widening and straightening the channel, *closing up chutes and side-cuts* leading from said river into the Mississippi river, and into the bottom lands of said river, and into sloughs; to erect booms and piers, *construct levees and dykes*, and repair and straighten the banks of said river," etc. It further declares that said charter "shall be deemed a public act, and its provisions shall be liberally and favorably construed." *Held*,
(1) That plaintiff took power under such charter, for the purpose of improving the navigation of Black River, to close by a dam the entrance of Black Snake River, which diverges from the main channel of Black River and rejoins it at a lower point, such stream being in the nature of a slough, and the entrance thereto a chute or side-cut, within the mean-

ing of the act; and this, although said Black Snake River was a navigable stream.

(2) That said charter (which required compensation to be ascertained and paid for any lands taken from private owners, but contained no such provision in respect to lands belonging to the state), by implication authorized the plaintiff to take, for the purpose of improving the navigation of said river in the manner provided, any lands of the state without compensation.

(3) That persons who purchased lands from the state *after* the erection of dams and embankments thereon by plaintiff, as authorized by the charter, took subject to plaintiff's right thus acquired.

(4) That where such an embankment was made by plaintiff upon land held by contract of sale from the state, with the consent of the purchaser, and such land was afterwards forfeited to the state and resold, the subsequent purchaser took subject to plaintiff's right.

(5) That riparian owners on a navigable stream cannot recover damages for a diversion of the water by the state, or by a corporation acting by authority of the state, for the improvement of the navigation. *Arimond v. Green Bay & M. Canal Co.*, 31 Wis., 316, and *Deloplain v. C. & N. W. Railway Co.*, 42 Wis., 230, distinguished. *The Black River Improvement Co. v. The La Crosse B. & T. Co. et al.*, 659

NEGLIGENCE.

See COURT AND JURY, 1, 6. DAMAGES, 5. EVIDENCE, 1-3. FLOWAGE OF LAND. RAILROADS, 4-10.

The rule in this state is, that a slight want of ordinary care on plaintiff's part, contributing to the injury, will defeat his recovery, however gross defendant's negligence may have been, provided his act was not wilful and malicious. *Randall et al., Ex'rs, v. N. W. Telegraph Co.*, 140

NEW TRIAL.

See RAILROADS, 10.

NONSUIT.

See INSURANCE, etc., 5. RAILROADS, 7. SLANDER, 2.

Where the plaintiff's evidence, supposing it to remain undisputed, and giving to it the most favorable construction that it will legitimately bear, including all reasonable inferences from it, would sustain a verdict in his favor, a peremptory nonsuit should not be ordered. *Spensley v. Lancashire Ins. Co.*, 433

NOTARY.

See EVIDENCE, 13.

NOTICE:

1. *Of Prior Mortgage.*
See MORTGAGE, 1, 2, 5.
2. *Of Election to Rescind.*
See PLEADING, 11.
3. *Of fact, to Partners.*
See PARTNERSHIP, 2.

NOVATION OF CONTRACT.

[*Quære*, whether plaintiff, after availing himself of the agreement of G. P. & Co. to pay the debts of P., H. & Co., can hold for such debts one of the last named firm not included in the new firm.] *Rumery v. McCulloch, Garnishee, etc.*, 565

OFFICER.

See FORECLOSURE OF MORTGAGE, 8. STATE SUPERINTENDENT.

ORDERS (of Court).

See AMENDMENT OF PLEADING. APPEAL (A.). ATTORNEY-AT-LAW. CONTINUANCE. DIVORCE. GARNISHMENT, 5. JUDGMENT (E.). PRACTICE, 2, 3. RAILROADS, 10. STAY OF PROCEEDINGS.

ORDERS (of Town Board).

See TOWNS.

OUSTER.

See EJECTMENT.

PARTIES.

1. *Parties plaintiff.*

See DEMURRER.

2. *Parties defendant.*

See CHATTEL MORTGAGE, 7. DIVORCE, 1.

PARTNERSHIP.

See ASSIGNMENT, 2, 3, 5, 6. PAYMENT, 1. PLEADING, 7. WILLS, 1.

1. The evidence in this case (stated in the opinion) justifies a finding that the sale of goods in question was made by plaintiffs to the defendants as copartners, and not to one of them individually; and it shows facts *estopping* all the defendants from denying that the sale was to the firm. *Jenkins et al. v. Davis et al., imp.*, 253
2. Where timber is purchased by a firm, prior notice to one member of the firm that it was cut from land not belonging to the proposed vendor, is notice to all the partners, so as to subject them all to the rule of damages prescribed in such cases by sec. 4269, R. S. *Tucker v. Cole et al.*, 539

PATENT OF LAND.

See EVIDENCE, 12. HOMESTEAD LAW, 2.

PAUPERS.

1. Sec. 1512, R. S., must be so construed as to require the supervisors of a town, in the first instance, to provide for the support, etc., of a pauper resident in such town, but without a settlement therein, under the circumstances there mentioned. *McCaffrey v. Town of Shields*, 645
2. Where a person resident in a town, without settlement therein, being mentally or physically disabled from earning a livelihood, and having no money to pay for the necessities of life, goes into another town for a transient purpose only, the fact that such person does not actually require food, shelter and lodging at the public expense until he has passed into such other town, will not relieve the town of his residence from the duty of providing for him as required by said sec. 1512. *Ibid.*

3. For relief furnished by a private person to one known to be a pauper and a legal charge upon a town, the town is not liable unless its supervisors, or at least two of them, have authorized the furnishing of such relief. *Mappes v. The Supervisors*, 47 Wis., 31, distinguished. *Ibid.*

PAYMENT.

1. R. held for collection a book account and also a note and mortgage against O. individually, and claims against O. and another as partners; and O. paid R. a sum in excess of said book account, to be applied on his individual indebtedness without further direction. *Held*, that R. was bound to apply the whole of said payment to O.'s individual debts then existing, and could not divert any part thereof to the payment of the firm debts, or of an indebtedness to be thereafter contracted by O. *Miles v. Ogden et al., imp.*, 573
2. When an agent, without authority, accepts a deed of land to his principal as a payment on a debt due the principal, a retention by the latter of the title is a ratification of the act. *Ibid.*
3. Even where a creditor, who holds his debtor's note and mortgage, has become bound to pay for legal services rendered by the debtor, the value of such services cannot be set up as a *payment* in an action upon the securities, without proof of an express agreement, made by the creditor or with his authority, that the services should be treated as a payment. *Ibid.*

PERSONAL PROPERTY.

See AGENCY. ASSIGNMENT. ATTACHMENT. CHATTEL MORTGAGE. CONTRACTS, 1. DAMAGES, 6-9. DEMAND. ESTATES OF DECEDENTS, 3-5. PLEADING, 8, 10-13. RESCISSION OF CONTRACT. SALE OF CHATTELS. TENANTS IN COMMON.

PLEADING.

See AMENDMENT OF PLEADING. COUNTERCLAIM. DAMAGES, 1. DEMAND, 2. DEMURRER. DIVORCE, 1. EVIDENCE, 5. GARNISHMENT, 3. LIBEL, 1. LICENSE, 1. LIMITATION OF ACTIONS, 2, 3. REFORMATION OF DEED, 2.

1. The complaint herein is held to state a cause of action in trespass *quare clausum*, with allegations of the injury, destruction and carrying way of personal property, in aggravation of damages. *Tallman v. Barnes*, 181
2. In such an action, defendant cannot set up an equitable counterclaim, as owner in common with plaintiff of the personal property injured or taken, to have plaintiff required to account for the use of defendant's share of the property, and to have the property sold and the proceeds divided between the parties; such a claim not arising out of the trespass complained of, nor being connected with the subject of the action. *Ibid.*
3. From an averment by defendant that he took possession of the property "peaceably, without unnecessary force," it must be presumed that he took possession by force. *Ibid.*
4. Where a complaint is amended after answer, new averments will be taken as admitted unless a further answer thereto is made, except where the averments of the first answer are sufficiently broad to meet such new averments. *Kelly v. Bliss*, 187

5. In such a case, where the objection that there is no answer to the new averments of the complaint is first taken in the appellate court, the answer will be construed liberally in favor of the defendant. And in this case, where the answer, after alleging that the sale of the interest named in the complaint was made to defendant's wife, and not to defendant himself, further averred that this was *the only contract* for the sale of any interest in said vessel ever made between plaintiff and defendant, this is held a sufficient denial of a new averment in the amended complaint of a subsequent agreement to rescind the contract of sale and repay the moneys paid thereon. *Ibid.*
- [6. A *general denial* pleaded to a complaint cannot operate as a denial of new averments of fact in an amended complaint.] *Ibid.*
7. In an action against E. and B. for goods sold and delivered to them as partners, B. answered denying material allegations of the complaint, and also alleged that "although no copartnership relations in fact ever existed between him and E., still, for the sole reason that he desired to have the case disposed of on the merits, the allegations of the complaint as to a copartnership were not controverted." He also, by way of counterclaim, alleged certain facts as to a non-delivery by plaintiffs of goods sold by them to E., and that "by reason of said premises and the failure of plaintiffs to perform their contract, the defendant E., and this defendant (B.) if he should be adjudged herein to be a partner of said E., have sustained damages," etc. *Held*,
 (1) That the answer must be construed as admitting the partnership alleged in the complaint.
 (2) That after such averment and admission, B., as one of the partners, might, by his separate answer, set up the counterclaim in favor of the firm. *Elliott et al. v. Espenhain et al.*, 231
8. In an action not for a rescission but for damages for the false representations of defendant in the sale of a note and mortgage, where the validity of the instruments is not denied, and it does not appear that the mortgage has been foreclosed, the complaint is bad if it fails to show that the securities are insufficient, and what would be the probable deficiency upon a sale on foreclosure of the mortgage. *Foster v. Taggart*, 391
9. A greater latitude of presumption will be indulged to sustain a complaint where the objection that it does not state a cause of action is first taken at the trial, than where it is previously taken by demurrer. *Potter v. Taggart*, 395
10. Action to rescind a sale of a note and a mortgage, on the ground that plaintiff was induced to purchase by defendant's false and fraudulent representation that the lien of the mortgage still continued upon the whole of the land therein described, being sixty-two acres, when in fact twenty-two acres had been released by the defendant (the mortgagee). The complaint alleges that, because of such release, the mortgage and note became of little value, and that plaintiff had thereby "lost all the benefit and advantage which he would otherwise have derived from the purchase." On an objection to the complaint first taken at the trial: *Held*, that it sufficiently alleges a fraudulent representation or concealment injurious to the plaintiff. *Ibid.*
11. The complaint avers that, as soon as plaintiff learned the facts, he went to defendant "for the purpose of demanding of him a return" of the sum paid for the note and mortgage, "but the defendant then and there refused to do anything in regard to the matter, and then and there

refused, and still does refuse, to return to plaintiff said sum or any part thereof." *Held*, that this sufficiently shows a notice to defendant of plaintiff's election to rescind the contract, and an offer to return the note and mortgage. *Ibid.*

12. No formal *tender* of the thing sold is necessary when the vendor refuses to assent to a rescission of the sale and repay the purchase money. *Ibid.*
13. The omission of the complaint to state that the plaintiff is ready and willing to restore the note and mortgage to defendant, does not render it liable to a demurrer *ore tenus*; but plaintiff will be required to prove on the trial that he is in a condition to make such restoration, and should make it then and there. *Ibid.*

POOR LAWS.

See PAUPERS.

POWERS.

See FORECLOSURE OF MORTGAGE, 1-6.

PRACTICE.

See ABATEMENT OF ACTION. AMENDMENT OF PLEADING. APPEAL. ATTACHMENT. ATTORNEY-AT-LAW. CERTIORARI. CONTINUANCE. COSTS. COUNTERCLAIM. CRIMINAL LAW, etc., 1. DEMURRER. DIVORCE, 1, 2. EVIDENCE, 7, 13. GARNISHMENT, 3-5. JOINDER. JUDGMENT (E.). LIMITATION OF ACTIONS, 2. MUNICIPAL COURT OF DANE CO. NONSUIT. PLEADING, 2, 4-7, 9, 13. STATE SUPERINTENDENT, 2. STAY OF PROCEEDINGS. SUMMONS. VERDICT. WILLS, 2.

1. Where one of several defendants has obtained a separate trial and judgment, and the action against him is pending on an appeal to this court, the court below may still proceed to try the action between the plaintiff and other defendants; and if the original pleadings are still on file here, the want of them may be supplied by furnishing copies for the use of the trial court. *Hayes v. Frey et al.*, 503
2. When the time limited by statute for appealing has expired, the circuit court loses all power to enlarge the time for settling the bill of exceptions in the case, and an order for such enlargement under such circumstances affects a substantial right, and is *appealable*. So *held* where the enlarging order was made by a court commissioner just *before* the time for appealing expired, and was confirmed by the court *after* the time for appealing, as limited by the statute, had expired. *Evans v. St. Paul F. & M. Ins. Co.*, 522
3. An order confirming a referee's report is in effect a denial of a motion to set the report aside. *Houghton v. Milburn et ux.*, 554

PRACTICE IN SUPREME COURT.

See APPEAL (A.), 2.

PRESUMPTION.

See FORECLOSURE OF MORTGAGE, 2. LIMITATION OF ACTIONS, 3. PLEADING, 3, 9.

PRINCIPAL AND AGENT.

See AGENCY.

RAILROADS.

See COURT AND JURY, 6. DAMAGES, 1-5.

1. If a railroad company takes possession of land without the owner's consent, and without having ascertained, under the process given by the statute, and paid the due compensation therefor, it is a trespasser, and liable in an action of trespass. *Rusch v. Mil., L. S. & W. Railway Co.*, 136
2. The mere failure of a land-owner to order a railroad company off his land, or to bring his action against it as a trespasser until near the end of the statutory period of limitation, will not operate as a consent to its occupation and use of the land. *Ibid.*
3. Several years before the commencement of this action, at the instance of the defendant company, proceedings were had to condemn land, which were regular except that the commissioners awarded a *gross sum* as compensation to all of six lot-owners, who held in severalty (including the plaintiff), without specifying the sum to which each was entitled. The company paid the money into court, and nothing further was done in the proceeding. *Held*, that the condemnation proceedings are ended, and not pending so as to permit the award to be now corrected at the instance of either party; and that they were without any effect upon the rights of the parties. *Ibid.*
4. Plaintiff, while going as a shoveler of snow for the defendant company upon a train engaged in the business of removing snow from the track, was injured by the overturning of the car in which he rode, by reason of an unsuccessful attempt of the conductor to remove a snow-bank from the track by means of the snow-plow alone, aided by the momentum of the train. *Held*, upon all the facts set out in the complaint, that a recovery by plaintiff is precluded by the facts that such overturning of his car was one of the perils of the business which he assumed, and that the conductor and others whose negligence is alleged, were fellow-servants in the same employment. *Howland v. Mil., L. S. & W. Railway Co.*, 226
5. A regulation by a railway company, by which one who has paid his fare between two points on the road, but desires to stop over at an intermediate point, is required to procure a stop-over ticket from the conductor, and present it to the conductor of the train on which he seeks to complete his journey, as evidence of his right to do so without further payment, is a reasonable regulation. *Yorton v. Mil., L. S. & W. Railway Co.*, 234
6. If the passenger, in such a case, asks the proper conductor for a stop-over ticket, and, through the conductor's fault, receives instead thereof only a trip check, the second conductor may still demand of him the additional fare, and, upon his refusal to pay it, may eject him from the train at some usual stopping place, using no unnecessary force; and such ejection will be no ground of recovery against the company, though such company will be liable to the passenger for the fault of the first conductor. *Ibid.*
7. In an action against a railway company (under sec. 1816, R. S.), for injuries to an employee, where the whole evidence shows beyond dispute that the sole cause of the injuries was the use of one bolt of insufficient length in fastening a slat of the ladder of a freight car, together with the somewhat decayed condition of the wood at the place of such bolt, and that there was no external indication of these defects, and the per-

son injured had been frequently in charge of the same car and in the habit of using the same ladder—there was no error in directing a non-suit. *Ballou, Adm'x, v. C., M. & St. P. Railway Co.*, 257

8. One railroad company receiving a loaded car from another, and running it upon its own road, is not bound to repeat the tests which are proper to be used in the original construction of such a car, but may assume that all parts of the car which *appear* to be in good condition, are so in fact. *Ibid.*
9. One who passed out of a railway car and got upon the platform thereof, and attempted to step or jump from the car, while it was in motion, cannot recover for injuries suffered in consequence thereof, even though he had reached his place of destination, and the train, which had previously stopped to permit passengers to alight, had not so stopped for a reasonable length of time. *Jewell v. C., St. P. & M. Railway Co.*, 610
10. Upon the admitted facts and those shown by undisputed evidence in this case, this court holds that the court below erred in not setting aside special findings of the jury to the effect that the plaintiff was not guilty of contributory negligence, and granting a new trial, though there was also a general verdict in plaintiff's favor. *Ibid.*

RATIFICATION.

See PAYMENT, 2.

One who accepts, with knowledge of all the facts, the avails of a compromise and settlement of a controversy, made in his behalf without authority, thereby ratifies the settlement; and ratification in that manner of a part of the unauthorized transaction is a ratification of the whole. *Strasser v. Conklin*, 102

REAL PROPERTY.

See ADVERSE POSSESSION. AMENDMENT OF PLEADING, 2. ASSIGNMENT, 5, 6. BOUNDARIES OF LAND. CONFLICT OF LAWS. CONTRACTS, 2, 3. DEDICATION. DEED. DIVORCE, 1. DOWER. EJECTMENT. ESTATES OF DECEDENTS, 1, 2, 4. EVIDENCE, 9-12. FLOWAGE OF LAND. FORECLOSURE OF MORTGAGE. FRAUD, 4. FRAUDULENT CONVEYANCE. HOMESTEAD. HOMESTEAD LAW. INSURANCE, etc. JOINDER (B.). LANDLORD AND TENANT. LICENSE. LIMITATION OF ACTIONS. MARRIED WOMAN, 1. MORTGAGE. PLEADING, 1-3. RAILROADS, 1-3. REFORMATION OF DEED. REFORMATION OF LEASE. STAY OF PROCEEDINGS. TAX DEED. TRESPASS. TRUSTS.

REASSESSMENT.

See STAY OF PROCEEDINGS.

RECORD.

See EVIDENCE, 9-11.

RECORDING ACT.

See MORTGAGE, 1, 5.

REDEMPTION.

See CHATTEL MORTGAGE, 1-3.

REFORMATION OF DEED.

See REFORMATION OF LEASE.

1. In the absence of fraud, a conveyance will not be reformed without proof that, previous to its execution, there was a mutual agreement for the sale and purchase of a parcel of land different from that described in the deed, and that the misdescription was inserted by mistake. *James v. Culler*, 172
2. In an action for reformation of a deed, averments that the description of the premises in the deed "was erroneous, and in fact does not describe the premises purchased by the plaintiff and intended to be conveyed by the defendant, and that such erroneous description was inserted in such deed, and the deed accepted by the plaintiff, by mistake," with further averments stating precisely in what respect the description was erroneous, held sufficient allegations that defendant sold and plaintiff purchased the lands alleged to have been omitted from the description in the deed — especially after an answer denying that plaintiff purchased or defendant sold any land other than that described in the conveyance. *Ibid.*
3. Where reformation is sought on the ground of mutual mistake only, and it appears that the sale was as alleged in the complaint, and that the deed was accepted through a mistake on plaintiff's part, and the evidence received without objection also shows clearly and satisfactorily that the misdescription was inserted either through mistake or fraud on defendant's part, the deed should be reformed. *Ibid.*

REFORMATION OF LEASE.

The court will not insert in a lease important conditions which the parties never fully assented to; and there is no sufficient evidence in this case that the alleged agreement on defendant's part on which the action is based, formed part of the lease counted upon. *Ladwig et al. v. Haase*, 811

REGENTS OF UNIVERSITY.

See UNIVERSITY OF WISCONSIN.

REGISTRY OF DEEDS.

See EVIDENCE, 9-11.

REPEAL OF STATUTE.

See ESTATES OF DECEDENTS, 5. LICENSE LAWS.

REPLEVIN.

See EVIDENCE, 8.

RES ADJUDICATA.

See ASSIGNMENT, 3.

1. By the decision in a former appeal herein (50 Wis., 210), it was determined that ch. 92 of 1872, annexing certain townships to the village of Shawano, was unconstitutional, and that the lands here in question were not taxable by the authorities of said village. But the question arising on this appeal, whether said lands were taxable by the authorities of the town of Seneca, is not *res adjudicata* by that decision, the parties having omitted, upon the former trial, at the request of the court below, to litigate that question. *Smith v. Sherry*, 114

2. The question of the plaintiff's liability for any deficiency upon a foreclosure sale of mortgaged premises having been put in issue by the complaint and his answer in the foreclosure suit, and determined against him by the judgment, he cannot have that question retried by a suit to restrain the enforcement of that judgment. *Ketchum v. Breed*, 131

RESCISSION OF CONTRACTS.

See PLEADING, 10-13.

1. If personal property is totally destroyed during the existence of an executory contract for the sale and purchase of an interest therein, this is equivalent to an unqualified rescission of the contract, and the vendee may recover so much of the contract price as has been paid. *Kelly v. Bliss*, 187
2. A contract (in this case for the sale of personal property) may be modified and perhaps rescinded without any new consideration; and in case of a rescission the release of each party from the obligations of the contract is a sufficient consideration. *Ibid.*

REVOCATION OF LICENSE.

See LICENSE, 2.

RIPARIAN RIGHTS.

See NAVIGABLE RIVERS, 4 (5).

SALE OF LAND.

See FORECLOSURE OF MORTGAGE, 1-3. FRAUDULENT CONVEYANCE. INSURANCE, etc., 2.

SALE OF CHATTELS.

See AGENCY. CHATTEL MORTGAGE, 1, 2, 4, 7-9. DAMAGES, 6-9. RESCISSION OF CONTRACT.

1. Where D. purchased chattels of P., to be paid for when used or disposed of by D., and a part of them, remaining in store, were destroyed by fire: *Held*, that D. thereupon became immediately liable for the price of the chattels so destroyed; but that he would not become bound to pay the price of those remaining undestroyed, until he should use or dispose of them, or until, at least, a reasonable time should elapse to enable him to do so. *Powers v. Dellinger*, 339
2. A contract declares that W. & C. have sold to the M. M. Co., 65 per cent. of the entire cut of lumber for the season, cut from logs already delivered or to be delivered at a certain mill; said lumber to be cut and piled as the M. M. Co. may direct, and to be loaded on cars when that company shall have cars on the side-track therefor; in consideration thereof, the M. M. Co. agrees to pay \$16 per M. feet for said 65 per cent. of the entire cut, as follows: Said lumber to be "estimated" on or near the 15th of each month, and \$12 per M. feet in yard of the 65 per cent. of cut to be paid to W. & C. at the time of the "estimate," and the remaining \$4 per M. feet to be paid when the lumber is loaded on cars for shipping; "title to said lumber to vest in the M. M. Co. as soon as estimated;" and none of the lumber to be shipped until estimated and paid for. *Held*, that no title to any part of the lumber passed to the M. M. Co. under the terms of the contract, until the whole amount cut and in the yard at a

given time had been measured and determined by the parties, and the specific lumber sold to said company had been set apart and distinguished from the remainder; but when this was done, the title to such lumber would immediately pass, before any payment made. *Galloway v. Week et al.*, 604

3. Proof that several piles of the lumber in the yard had been estimated by the M. M. Co. in the presence or with the knowledge of W. & C. or their agent, and had been marked by the company with its initials and with figures showing the quantity in each pile; that these piles were subsequently sold by the company to the plaintiff; and that the company had made large advances on the contract—*held*, insufficient to show title in the plaintiff, in the absence of any evidence that W. & C. had assented to such marking of the piles, or such sale, or agreed that the title to such piles should pass to the company. *Ibid.*

SCHOOL DISTRICT.

See STATE SUPERINTENDENT, 1.

SEAL.

See FORECLOSURE OF MORTGAGE, 7. TAX DEED, 1.

SHEBOYGAN, CITY OF.

See COUNTIES, 2, 3.

SLANDER.

1. In slander, in determining whether words are actionable *per se*, they are to be taken in the sense in which they would naturally be understood by those who heard them. *Campbell v. Campbell*, 90
2. The words, "she is slow poisoning her husband," are capable of being understood as charging the giving of poison with intent to kill; and where that meaning is attributed to them by proper innuendoes, and there is sufficient evidence to support a finding that they were so intended, a nonsuit should be denied. *Ibid.*
3. The plaintiff was allowed to testify that she understood the words complained of as referring to her. She also testified to facts showing clearly that such was the reference of the words. *Held*, that the admission of the evidence was not ground of reversal. *Ibid.*
4. The court charged the jury to consider "all the evidence on both sides touching the moral character of the plaintiff," but did not definitely state what effect, if any, such character should have in determining the amount of damages; and it refused to charge that in actions for slander "a person of bad character is not entitled to the same measure of damages as one of good character;" and that if plaintiff's "general character" was bad, that fact must be considered in determining the damages. *Held*, that such refusal was error. *Ibid.*

SPECIAL VERDICT.

See LIBEL, 2. RAILROADS, 10. VERDICT, 1, 2, 4.

STATE SUPERINTENDENT.

See CERTIORARI.

1. The statutes imposing upon the state superintendent the duty of determining questions of the division of school districts, on appeal from the decisions of town boards, is valid, the power conferred being only *quasi*

judicial. [But to what extent the jurisdiction would be upheld in questions involving grave property and personal rights, it was not necessary to decide in this case.] *State ex rel. Moreland v. Whitford*, 150

2. The superintendent has power to make all needful rules and regulations for the hearing of such cases by him, including a rule requiring the evidence to be submitted in the form of affidavits, and the arguments of parties or their counsel in writing, without a personal hearing or oral examination of witnesses before him. *Ibid.*

STATUTES CITED, Etc.

CONSTITUTION OF WISCONSIN.		REVISED STATUTES OF 1838.	
Art. I, secs. 9, 16, - - -	378	Ch. 13, secs. 29, 30, 31, 39, -	120
" X, - - - - -	161	" 21, - - - - -	167
" X, sec. 3, - - - - -	162	" 34, sec. 20, - - - - -	649
" XII, " 1, - - - 318, 332-5, 341		" 79, - - - - -	677
SESSION LAWS.		" 84, secs. 7, 9, - - - - -	473
1838. No. 99, - - - - -	166	" 85, sec. 60, - - - - -	515
1850. Ch. 44, sec. 3, - - - 503, 511		" 86, " 9, - - - - -	469, 470
1850. " 229, " 2, - - - 503, 511		" 86, " 10, - - - 460, 469, 470, 471	
1857. " 9, - - - - -	677	" 86, " 25, - - - - -	636, 639
1859. " 22, secs. 25, 50, 51, -	68	" 86, " 31, - - - - -	69
1859. " 188, - - - - -	460	" 89, - - - - -	458
1861. P. & L., ch. 63, sec. 22, -		" 89, sec. 17, - - - - -	456
subd. 2, - - - - -	488	" 89, " 18, - - - 452, 455, 456	
1862. Ch. 11, - - - - -	589	" 89, " 19, - - - - -	456
1863. " 220, - - - - -	295	" 99, " 1, subd. 6, 452, 456, 458	
1865. " 538, sec. 23, - - - - -	294	" 125, sec. 26, 27, - - -	222
1866. " 114, - - - - -	163	" 154, - - - - -	503, 504, 511
1867. " 75, - - - - -	291, 292	REVISED STATUTES OF 1878.	
1868. " 130, sec. 7, - - - - -	294	Section 378, - - - - -	170
1868. P. & L., ch. 254, subch. XI, -		" 379, - - - - -	165, 170
sec. 17, - - - - -	421	" 381, - - - - -	170
1869. Ch. 20, - - - - -	503, 504, 517	" 388, - - - - -	159, 162
1871. P. & L., ch. 45, - - - - -	108	Sections 412-18, - - - - -	155
1872. P. & L., ch. 92, - - - 114, 119		Section 497, - - - - -	155
1872. Ch. 144, - - - - -	667	" 670, - - - - -	114, 120
1873. " 291, sec. 3, - - - - -	138	" 670, subd. 11, - - - - -	120
1874. " 179, - - - - -	437, 489-90	" 671, - - - - -	114, 120
1876. " 117, - - - - -	169	" 673, - - - - -	120
1876. " 117, sec. 5, - - - - -	164	" 1113, - - - - -	420
1876. " 213, " 1, - - - - -	370	" 1114, - - - - -	415, 420
1876. " 399, - - - - -	667	" 1176, - - - - -	68, 69
1877. " 29, sec. 10, 14, 415, 420-1		" 1178, - - - - -	68
1877. " 106, - - - - -	452, 456-8	" 1189, - - - - -	129
1878. " 334, sec. 7, - - - 578-80, 582		" 1210b, - - - - -	581, 582
1880. " 232, - - - - -	260	" 1210d, - - - - -	115, 127-9
1880. " 233, - - - - -	248	" 1210e, - - - - -	115, 123-9
		" 1210f, - - - - -	129
		" 1227, - - - - -	86, 87
REVISED STATUTES OF 1839.		Sections 1300-7, - - - - -	531, 532
Page 184, - - - - -	455	Section 1308, - - - - -	528, 532, 533
REVISED STATUTES OF 1849.		" 1316, - - - - -	532
Ch. 18, - - - - -	167	" 1339, - - - - -	528, 533
" 59, sec. 12, - - - - -	503, 511	" 1499, - - - - -	648
" 62, " 13, - - - - -	455	" 1500, subd. 4, - - - - -	648

STATUTES CITED, Etc.—continued.

REVISED STATUTES OF 1878 — con.				REVISED STATUTES OF 1878 — con.			
Section	1501,	- - -	648	Section	2982,	- - -	589
"	1512,	- - -	645, 648-50	"	2983,	- - -	583, 584, 586
"	1513,	- - -	648	"	3069, subd. 2,	- - -	379, 380, 523
"	1517,	- - -	648, 650	"	3267,	- - -	504, 517
"	1518,	- - -	650	"	3763,	- - -	634
Sections	1771-91 (ch. 86),	318-15,	317	"	3767,	- - -	544, 548, 636
Section	1777,	- 315, 317,	667, 685	"	3769,	- - -	548, 636
"	1816,	- - -	257, 260	"	4087,	- - -	308
"	2156,	- - -	515, 517	Sections	4091-2,	- - -	308
Sections	2218-19,	- - -	471	"	4102, 4106,	- - -	521
Section	2241,	- - -	636, 639	Section	4112,	- - -	504, 521
"	2242,	- - -	639	"	4156,	- - -	69
"	2262,	- - -	69	"	4195,	- - -	62
"	2323,	- - -	656	"	4203,	- - -	504, 521
"	2343,	- - -	564	"	4216,	- - -	631, 632
"	2361,	- - -	642, 643	"	4221,	- - -	578
"	2609,	- - -	201	"	4253,	- - -	141, 150
Sections	2629-30,	- - -	214, 215	"	4257,	- - -	186
Section	2647, subd. 1,	- - -	552	"	4269,	- 115, 130, 131,	539
"	2651,	- - -	578	"	4337,	- - -	96
"	2656, subd. 3,	- - -	597	"	4374,	- - -	96
Sections	2656-7,	- - -	200	"	4384,	- - -	96
Section	2674,	- - -	365	"	4541,	- - -	368, 369
Sections	2677-8,	- - -	222	"	4971, subd. 3,	- - -	647
Section	2731,	- - -	496	"	4971,	" 19,	217
"	2731, subd. 5,	- - -	588	"	4976,	- - -	578
Sections	2745-6,	- - -	496	TAYLOR'S STATUTES.			
Section	2767,	- - -	599, 601	Page	304, § 62,	- - -	291, 292
"	2852,	- - -	366	"	1114,	- - -	470
"	2932,	- - -	388				

STATUTES, CONSTRUCTION OF.

See TOWNS. UNIVERSITY OF WISCONSIN.

STATUTES, REPEAL OF.

See ESTATES OF DECEDENTS, 5. LICENSE LAWS.

STATUTE OF LIMITATIONS.

See LIMITATION OF ACTIONS.

STAY OF PROCEEDINGS.

In an action to cancel tax certificates on sales made in 1879, the court found that the tax whose validity is questioned was based upon an assessment of the lands of the town not made by the assessor from actual view or the best practical information that could be obtained as to their actual value, nor at the fair cash value of the lands, or the price at which the owners would have been willing to sell them had they been desirous of so doing, and that the assessor intentionally and fraudulently assessed said lands in some cases at one-half, in others at one-third, in others at one-fourth their cash value, proceeding by an arbitrary rule regardless of the value. *Held*, that it was thereupon the duty of the court, under sec. 1210b, R. S., to stay all proceedings in the action until a proper reassessment of the property of the town could be made; and it was error to render judgment cancelling the certificates without waiting for such reassessment. *Clarke v. Lincoln Co.*, 580

SUMMONS.

Under our statute (R. S., secs. 2629-30), which provides that the summons in a civil action "shall be subscribed by the plaintiff or his attorney," it is not necessary that the name of the plaintiff or his attorney be written in his own hand at the bottom of the summons, but it may be printed. *Mezchen v. More, imp.* 214

SUPREME COURT.

See **APPEAL (A.). JUDGMENT (E.), (F.).**

SURETYSHIP.

See **GUARANTY.**

SURVIVAL OF ACTION.

See **ABATEMENT OF ACTION.**

TAXATION.

See **COUNTIES, 2.**

TAX CERTIFICATES.

See **LIMITATION OF ACTIONS, 1, 2, 4.**

TAX DEED.

1. Where a tax deed as recorded purports to have been executed by the county clerk in behalf of the state and county, and duly witnessed and acknowledged, and recites that the clerk has subscribed his name officially and affixed the seal of the county board, it is admissible in evidence of title, although the only representation of a seal thereon is a scroll near the clerk's name, with the word "seal" written within it. *Putney v. Cutler et al.*, 65
2. A tax deed, after the expiration of the statutory period of limitation, is conclusive of the regularity of the proceedings upon which it is based, *only in cases where the lands were taxable* by the town or other taxing district whose authorities assumed to levy the tax. In other cases, *where the lands were outside of the jurisdiction of such town or other taxing district, the sale and deed are mere nullities, and do not set the statutes to running.* *Smith v. Sherry*, 114
3. Section 1210e, R. S., was designed merely to limit the time for bringing the equitable action therein mentioned, by the original land-owner, and does not prevent the running in his favor (when he is in possession of the land) of the limitation prescribed by sec. 1210d. *Ibid.*
4. To stop the running of the statute of limitations on tax deeds, against the former owner, it is sufficient that he be in actual and open possession for any considerable portion of the statutory period; and upon the facts found in this case (recited below), defendant's possession is held to have been sufficient for that purpose. *Ibid.*
- [5. It is an open question in this court, whether a tax-title claimant who has never acquired the actual possession of the land, can recover against the former owner, as damages (under sec. 4269, R. S.), for timber removed by such former owner while the land was in his possession, its highest market value between such removal and the trial.] *Ibid.*

TAX PROCEEDINGS.

See **STAY OF PROCEEDINGS. TAX DEED, 2.**

TAX SALES.

1. Sec. 7, ch. 334, Laws of 1878, which limited the right of action to set aside tax sales, or cancel tax certificates, to a period of nine months from the date of the sale or certificate, etc., was valid. *Clarke v. Lincoln Co.*, 590
2. A tax deed, after the expiration of the statutory period of limitation, is conclusive of the regularity of the proceedings upon which it is based, *only in cases where the lands were taxable* by the town or other taxing district whose authorities assumed to levy the tax. In other cases, as where the lands were outside of the jurisdiction of such town or other taxing district, the sale and deed are mere nullities and do not set the statutes to running. *Smith v. Sherry*, 114

TENANTS AT WILL.

Where, after the expiration of his term, one who has been in possession as a lessee, is permitted by a subsequent lessee to remain in possession until the latter shall notify him to remove, he is a tenant at will, and is the only person who can bring trespass *quare clausum* for an unlawful entry on the premises by a third person. *Gunsolus et al. v. Lormer et al.*, 63)

TENANTS IN COMMON.

1. One tenant in common of personal property has no right to take possession of the property by force from his cotenant; but, after getting the possession peaceably, he may maintain it by force. *Tallman v. Barnes*, 181
2. One whose pleading shows him to have unlawfully taken from the opposite party by force a part of the property which belongs to them in common, and to be holding the same, will not be heard in equity to ask for equitable relief as to the common property. *Ibid.*
- [3. *It seems* that where one of two tenants in common of personalty has forcibly taken possession of the property, the other cannot recover the value of his interest therein in an action of trespass, unless the property has been destroyed.] *Ibid.*
4. Where a contract of sale of a part interest in a vessel was executed so that title vested in the vendee, and the vessel was afterwards run by the other owners, and while so run was totally destroyed, and such other owners recovered the damages for her destruction from the person liable therefor, the vendee of such part interest was entitled to an accounting by the other owners, of his share in the net proceeds of the use of the vessel and of the net amount of the damages recovered; but he could not recover purchase moneys paid by him. *Kelly v. Bliss*, 187

TENDER.

1. Where a chattel mortgagee has realized money from the use of the property and has unlawfully sold part of it, the mortgagor may sue in equity to charge him with the moneys thus realized, and to redeem the unsold part on payment of any sum which may be found due on the mortgage debt upon an accounting; and where an accounting by the mortgagee is necessary to determine the amount so due, no tender of the amount is necessary before bringing the action to redeem. *Boyd v. Beaudin et al.*, 193

2. The want of a tender of the balance due, before the commencement of an action to redeem, will not defeat the action, but affects only the costs. *Ibid.*
3. No formal *tender* of the thing sold is necessary when the vendor refuses to assent to a rescission of the sale and repay the purchase money. *Potter v. Taggart*, 395

TOLLS.

See NAVIGABLE RIVERS, 1-3.

TORNADO.

See INSURANCE, etc., 5.

TORTS.

See DAMAGES, 1-5. DEMAND. EVIDENCE, 1-6. FLOWAGE OF LAND. HIGHWAYS. LIBEL. LICENSE. NEGLIGENCE. PLEADING, 1-3, 8. RAILROADS. SLANDER. TRESPASS.

TOWNS.

1. The statutes (secs. 670, 671, R. S.) prescribing the form in which orders and determinations of a county board for changing the boundaries of towns shall be made, and requiring their publication, are *mandatory*, and must be substantially complied with, to effect such a change. *Smith v. Sherry*, 114
2. Under our statute (sec. 1339, R. S.), a town is relieved from liability, and the county is liable, for damage caused by the defective condition of a highway, only where such highway has been "adopted" as part of a county highway, under sec. 1308, R. S., and not in cases where a road has been merely "laid out" by the county board, under secs. 1300-1307. *Stilling v. Town of Thorp*, 523
3. Sec. 1512, R. S., must be so construed as to require the supervisors of a town, in the first instance, to provide for the support, etc., of a pauper resident in such town, but without a settlement therein, under the circumstances there mentioned. *McCaffrey v. Town of Shields*, 645
4. Where a person resident in a town, without settlement therein, being mentally or physically disabled from earning a livelihood, and having no money to pay for the necessities of life, goes into another town for a transient purpose only, the fact that such person does not actually require food, shelter and lodging at the public expense until he has passed into such other town, will not relieve the *town of his residence* from the duty of providing for him as required by said sec. 1512. *Ibid.*
5. For relief furnished by a private person to one known to be a pauper and a legal charge upon a town, the town is not liable unless its supervisors, or at least two of them, have authorized the furnishing of such relief. *Mappes v. The Supervisors*, 47 Wis., 31, distinguished. *Ibid.*

TRESPASS.

See LANDLORD AND TENANT, 1.

1. If a railroad company takes possession of land without the owner's consent, and without having ascertained, under the process given by the statute, and paid the due compensation therefor, it is a trespasser, and liable in an action of trespass. *Rusch v. Mil., L. S. & W. Railway Co.*, 136

2. The mere failure of a land-owner to order a railroad company off his land, or to bring his action against it as a trespasser until near the end of the statutory period of limitation, will not operate as a *consent* to its occupation and use of the land. *Ibid.*
3. One tenant in common of personal property has no right to take possession of the property by force from his cotenant; but, after getting the possession peaceably, he may maintain it by force. *Tallman v. Barnes*, 181
- [4. *It seems* that where one of two tenants in common of personalty has forcibly taken possession of the property, the other cannot recover the value of his interest therein in an action of trespass, unless the property has been destroyed.] *Ibid.*
5. Only the person in the actual or constructive possession of real property can maintain trespass *quare clausum* in reference thereto; and such constructive possession is only that of the *owner*, when no person is in the actual possession. *Gunsolus et al. v. Lormer et al.*, 630

TRIAL DE NOVO.

On appeal from justice's court in a case where, by the statute (sec. 3767, R. S.), the cause is required to be "heard on the original papers and the return of the justice containing all the material evidence," etc., the court cannot take authority, from a *stipulation* of the parties to try the cause *de novo* as if originally brought in that court; and a judgment rendered upon such a trial is held, upon appeal, *void* for want of jurisdiction. *Bullard v. Kuhl*, 544

TRUSTS.

See CONTRACTS, 4 (2).

In ejectment against A., the fact that B. paid for the land when the deed was made to A., without proof that the deed was so taken by A. without the consent or knowledge of B., is no evidence that A. holds the land in trust for B. or his heirs. *Knight v. Leary*, 459

UMPIRE.

1. A contract for the erection of a dwelling by T. for B., provides that T. shall complete it in all its parts "in a good, substantial and workman-like manner, to the acceptance of W. D., architect;" that if a dispute shall arise respecting the true construction of the drawings or specifications, the same shall be finally decided by the architect, but if any dispute shall arise respecting the true value of any extra work, or of work omitted, "the same shall be valued" by arbitrators, whose appointment is provided for; and that the work is to be executed "so as to fully carry out the design for said building as set forth in the specifications or shown on the plans, and according to the true spirit, meaning and intent thereof, and to the full satisfaction of W. D., architect, . . . and to the satisfaction of the owner." Held, that the last provision has no reference to the quality of the workmanship or materials, and as to these, in the absence of proof of fraud, mistake or unfair dealing on the part of the architect, his acceptance of the work as satisfactory binds the owner. *Tetz v. Butterfield*, 242

2. In an action by the builder upon the contract, the answer alleges that improper and inferior material was used by the plaintiff; and that if the architect "has expressed satisfaction with said work, he has failed to discharge his duty as an architect, and has done so in fraud of the rights of defendant, and through some collusive arrangement, as defendant is informed and believes, between himself and the plaintiff." On the trial, defendant offered evidence to show that one of the floors was made of rotten flooring, and that much of the material used was rotten, etc., and that before plaintiff quit work, defendant notified him and the architect that he (defendant) was not satisfied with the work and material. *Held*, that it was error to reject this evidence, as it tended to show *bad faith* on the part of the architect in accepting the building, and such proof was admissible under the contract and answer. *Ibid.*

UNIVERSITY OF WISCONSIN.

1. The board of regents of the state university, as a corporate body, has no powers except such as are conferred upon it by statute, either by express language or by fair implication. *State ex rel. Priest v. The Regents*, 159
2. All the acts of the legislature relating to the university, construed together, conclusively establish a legislative intent that, under the general grant of power to make laws for the government of the university, the grant of "all the powers necessary or convenient to accomplish the objects and perform the duties prescribed by law," and other like grants in successive statutes defining the functions of the board, it should take the power to exact fees from students, for admission, instruction and the incidental expenses of the university, except as such power was, from time to time, expressly limited. *Ibid.*
3. Sec. 388, R. S., which provides that no student who has been a resident of the state for one year next preceding his admission to the state university, shall be required to pay "any fees for tuition" therein, except in the law department and for extra studies, must be construed as prohibiting only fees for instruction, and not charges made to meet incidental expenses. *Ibid.*
4. The heating and lighting of public halls and rooms of the university are necessary and convenient for the accomplishment of the objects of the institution; and the general powers granted to the board of regents authorized it to enact the existing by-law, under which there is exacted from each student in attendance a fractional share of the expense of such heating and lighting, as a part of the incidental expenses. *Ibid.*

VENDOR AND VENDEE.

1. If personal property is totally destroyed during the existence of an executory contract for the sale and purchase of an interest therein, this is equivalent to an unqualified rescission of the contract, and the vendee may recover so much of the contract price as has been paid. *Kelly v. Bliss*, 187
2. A contract (in this case for the sale of personal property) may be modified and perhaps rescinded without any *new* consideration; and in case of a rescission the release of each party from the obligations of the contract is a sufficient consideration. *Ibid.*

VERDICT.

1. Questions of fact not controverted by the pleadings and evidence need not be submitted, where a special verdict is demanded. *Ault v. W. & W. Manuf'g Co.*, 300
2. Where there is a special verdict covering all material controverted issues, the taking of a general verdict consistent therewith is not error. *Ibid.*
3. A verdict in an action of trespass, where a boundary line was in dispute, that the jury find "for the defendant, that he was not guilty of the trespass complained of," adds that they "establish the line as made by A., B. & C., and that each party pay his own costs of suit." *Held*, that it was properly treated as a mere general verdict for the defendant, the remainder being disregarded. *Parkinson v. McQuaid*, 473
4. Each question submitted to a jury for a special verdict should be limited to a single, direct and controverted issue of fact, and should be so stated that the answer will necessarily be positive, direct and intelligible. *Jewell v. C., St. P. & M. Railway Co.*, 610
5. A judgment upon verdict will not be reversed upon the weight of evidence, where there is evidence sufficient to support the verdict. *Powers v. Dellinger*, 389
6. A judgment upon verdict against defendant for the value of the whole of certain chattels is reversed for want of any evidence of defendant's liability as to a part of the chattels. *Ibid.*
7. Upon the admitted facts and those shown by undisputed evidence in this case, this court holds that the court below erred in not setting aside special findings of the jury to the effect that the plaintiff was not guilty of contributory negligence, and granting a new trial, though there was also a general verdict in plaintiff's favor. *Jewell v. C., St. P. & M. Railway Co.*, 610

VERIFICATION OF ANSWER.

See GARNISHMENT, 3.

VIEW OF PREMISES, Etc.

1. It is discretionary with the trial court whether it will permit the jury, on motion of a party, to view premises or property; and its determination on that point will not be reviewed on appeal. *Boardman et al. v. Westchester Fire Ins. Co.*, 364
2. If the jury are guilty of any misconduct in making the view, or the court errs in instructing them as to the effect they may give to matters which have fallen under their observation while making it, the appellant must cause such misconduct or such erroneous instruction to appear by the bill of exceptions. *Ibid.*
3. What was said by counsel by way of argument to induce the court to order a view to be taken by the jury, cannot be alleged for error. *Ibid.*

WAIVER.

1. In an action for a conversion, an answer alleging title in defendant would, if standing alone, operate as a waiver of a demand; but if there is also a general denial, perhaps, on failure to show a *tortious* taking, it might be necessary for plaintiff to show a demand before suit brought. In this case, however, a demand was conclusively proven. *Ault v. W. & W. Manuf. Co.*, 300

2. Where a person whom a garnishee's answer discloses as a claimant of the fund in dispute, has been ordered to interplead (R. S., sec. 2767), and has answered setting up his claim, and the plaintiffs have taken issue on the answer, and gone to trial thereon, they cannot afterwards object that the answer is unverified or out of time. *Kirby et al. v. Corning, Garnishes, et al.*, 599

WATER COURSES.

See FLOWAGE OF LAND. NAVIGABLE RIVERS.

WILLS.

See ESTATES OF DECEDENTS.

1. By articles of copartnership between N. D. and T. D., as modified soon after by written agreement, each was to put, and each did in fact put, \$20,000 as capital into the partnership business. By those articles, also, each was entitled to draw out annually his share of the annual profits. None of the "capital" of the firm, nor any of the "accrued but undivided profits," were to be used by the parties except in the business; and, at the dissolution of the firm, each was to draw out the amount of "capital" originally contributed by him, less his share of the losses, if any, and the remainder of the assets was to be divided between them in the manner prescribed for division of profits. A codicil added to N. D.'s will just before his death provides that his executors shall leave in said business, for two years, all his "present capital" therein, and that at the end of the two years they shall receive from T. D. one-half of the net value of his (the testator's) interest in the business, and thereupon execute to T. D. the necessary assignments and conveyances to vest in him all the testator's right, title and interest in said business; the intention being declared to be to vest in T. D. the testator's "entire interest in said business, subject to the limitations and restrictions aforesaid." At the time of N. D.'s death his assets in said business were about \$43,000, of which about \$23,000 were accumulated and undivided profits, in the form of real property, lumber, notes, etc. *Held*, that the fund which the executors are required to leave in said business for two years is only the \$20,000 first above named; there being, in the judgment of this court, no sufficient proof that the remaining \$23,000 had ever been capitalized by agreement of the parties. *Dean et al., Ex'rs, v. Dean et al.*, 23
2. The suit being by the executors for a construction of the codicil, and the appeal by residuary legatees, *held*, that there was no error in directing the costs of the plaintiffs and of the defendant T. D., and also the costs of the other defendants as between attorney and client, to be paid out of the estate generally, and not out of the assets of the estate in said partnership business; the amount of the residuary fund being necessarily affected by the result of the suit. *Ibid.*

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